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In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

HONG YIN GAO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
DONALD E. KEENER
MARGARET PERRY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in holding, in the first instance and without prior resolution of the questions by the Attorney General, that women whose marriages are arranged can and do constitute a "particular social group" of "women sold into forced marriages," and that the alien would suffer "persecution" "on account of" that status.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, Alberto R. Gonzales, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 440 F.3d 62. The order of the Board of Immigration Appeals (App., *infra*, 19a), and the oral decision of the immigration judge (App., *infra*, 20a-26a), are unreported.

JURISDICTION

The court of appeals entered its judgment on March 3, 2006. A petition for rehearing was denied on October

19, 2006 (App., *infra*, 27a-28a). On January 8, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 16, 2007. On February 6, 2007, Justice Ginsburg further extended the time to March 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App., *infra*, 29a-35a.

STATEMENT

In this case, the Second Circuit held that an alien, respondent Hong Ying Gao, could qualify as a "refugee" under the asylum and withholding provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, based on a finding that her parents had arranged a marriage for her and that, when she declined to enter the marriage, her fiancé harassed her family either to follow through with the marriage or to return the money he had paid for the arrangement. The Second Circuit reasoned that being a woman whose parents have agreed to an arranged marriage for her in a region where such arrangements are considered valid and enforceable amounts to being "sold * * * into [a] forced marriage[]," App., *infra*, 14a, and thereby renders the woman a member of a "particular social group," which is one of the grounds for protection under the INA, 8 U.S.C. 1101(a)(42)(A).

That issue, and the interpretation of "membership in a particular social group" more generally, are of considerable significance in the administration of the INA. Although the Second Circuit acknowledged that the Board of Immigration Appeals and the immigration judge had failed to analyze the question whether respon-

dent qualified as a member of that "particular social group," the court of appeals definitively resolved that issue rather than remanding as required by *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam). The court then compounded its violation of *Ventura* by proceeding to decide, de novo, the questions of whether the prospective arranged marriage would itself be a form of "persecution" and whether that harassment was "on account of" Gao's membership in a social group, as opposed to the parent's refusal to refund the fiancé's money.

In *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006) (per curiam), this Court reconfirmed the erroneousness of the approach taken by the Second Circuit here. In *Thomas*, the Court reiterated that courts of appeals may not resolve issues in immigration cases that have not been decided by the Attorney General in the first instance. Because the Ninth Circuit had ignored that principle by deciding, in the first instance, that a group was a "particular social group" within the meaning of the statute, this Court in *Thomas* summarily reversed that court of appeals' en banc decision. *Id.* at 1614.

The Second Circuit here violated the same established principles of judicial review of agency action that supported summary reversal in *Thomas* and *Ventura*. The court committed those errors, moreover, in the course of establishing a novel and potentially sweeping interpretation of the INA that could have far-reaching implications for the Executive Branch's enforcement of immigration law in the highly sensitive context of culturally diverse approaches to marriage. Indeed, the Department of Homeland Security estimates that approximately 60% of all marriages worldwide, and 96% of marriages in India, are arranged on terms that are often similar to those that the Second Circuit held in this case

give rise to protected membership in a particular social group. Accordingly, this case merits vacatur and remand in light of *Thomas*.

1. a. Congress has charged the Secretary of Homeland Security (Secretary) "with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. 1103(a)(1) (Supp. IV 2004), as amended by the Homeland Security Act Amendments of 2003, Pub. L. No. 108-7, Div. L, § 105(1), 117 Stat. 531. Congress vested the Secretary with the authority to make asylum determinations for aliens who are not in removal proceedings. See 6 U.S.C. 271(b)(3) (Supp. IV 2004); see also 8 C.F.R. 208.2(a), 208.4(b), 208.9(a).

The Attorney General is responsible for conducting administrative removal proceedings against an alien charged by the Department of Homeland Security with being removable. See 8 U.S.C. 1101(a)(1), 1229a(a)(1). Removal hearings are conducted by immigration judges in the Executive Office for Immigration Review within the Department of Justice, and the Board of Immigration Appeals (Board) hears appeals from decisions of the immigration judges. See 8 C.F.R. 1003.1, 1240.1(a)(1), 1240.15. The Attorney General has the authority to review any decision of the Board. See 8 C.F.R. 1003.1(h). The INA further directs that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a)(1) (Supp. IV 2004).

b. An alien may be granted asylum, in the Attorney General's discretion, if "the Attorney General determines that such alien is a refugee." REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a)(1), 119 Stat. 302 (to be codified at 8 U.S.C. 1158(b)(1)(A) (Supp. V

2005)). The INA defines a "refugee" as a person who is unwilling or unable to return to his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

In addition to the discretionary relief of asylum, mandatory withholding of removal from a particular country is available if "the Attorney General decides" than an alien's "life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

For purposes of those forms of protection from removal, "persecution" refers to significant mistreatment, and it must be inflicted by either the government of the applicant's country of origin, or by groups or individuals the government is "unable or unwilling to control." *In re Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); see *In re Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990). Persecution is an "extreme concept." *Fatin* v. *INS*, 12 F.3d 1233, 1243 (3d Cir. 1993) (Alito, J.). "[M]ere 'repugnance of . . . a governmental policy to our own concepts of . . . freedom' [is] not sufficient to justify labelling that policy as persecution." *Id.* at 1240 (quoting *Blazina* v. *Bouchard*, 286 F.2d 507, 511 (3d Cir.), cert. denied, 366 U.S. 950 (1961)). Adversities arising from personal relationships unconnected to a protected ground are not covered. See *In re Y-G-*, 20 I. & N. Dec. 794, 799-800 (BIA 1994); see also *Molina-Morales* v. *INS*, 237 F.3d 1048, 1051 (9th Cir. 2001).

c. The term "particular social group" in the definition of "refugee" and in the withholding of removal provision is not further defined in the Act. The Attorney General, through the Board, has interpreted "particular social group" in general terms to require, at a minimum, that the asserted group be a

> group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.

Acosta, 19 I. &. N. Dec. at 233. The group characteristic must be one which "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Ibid.* The group's shared characteristic, moreover, must "generally be recognizable by others in the community," and the group thus must have "social visibility" and be "perceived as a group by society." *In re A-M-E-*, 24 I. & N. Dec. 69, 74 (BIA 2007); see *In re C-A-*, 23 I. & N. Dec. 951, 959-960 (BIA 2006). The group "cannot be defined exclusively by the fact that its members have been subjected to harm." *In re A-M-E-*, 24 I. & N. Dec. at 74. Given the difficulty of defining "particular social group" in the abstract, as well as the potential issues of administrability and immigration and foreign policy implicated in recognizing social groups, the Board has held that identifying the "particular kind of group characteristic[s]" that will constitute a "particular social group" should be determined on a "case-by-case basis." *Acosta*, 19 I. & N. Dec. at 233.

2. Hong Yin Gao is a female native of the People's Republic of China who attempted to enter the United States without proper documentation in 2001. App., *infra*, 21a-22a. When she was placed in removal proceedings, she applied for asylum and withholding of removal. *Id.* at 21a. She testified that her parents contracted with a "go-between in her local village" to arrange a marriage for her. *Id.* at 22a. A man interested in a marriage, Chen Zhi, paid the "go-between" 18,800 RMB (approximately $2200) to be matched with Gao when she turned 21. *Ibid.* The go-between then provided Zhi's money to Gao's mother, who used the funds to pay family bills. *Id.* at 22a-23a.

Initially, Gao considered Zhi to be "a rather acceptable potential husband." App., *infra*, 23a. She changed her mind, however, when she determined that he had a "bad temperament" and gambled. According to her testimony, the relationship soured when Zhi refused to pay back his debts, and he once slapped her and refused to cancel the engagement. *Ibid.*

At that point, Gao decided not to marry Zhi and moved to the City of Mawei, which is about an hour away by boat from her home. App., *infra*, 3a, 23a. After her departure, Zhi occasionally harassed her family looking to have either his money returned or the marriage contract fulfilled. *Id.* at 23a. On one occasion, Zhi "smashed * * * something" in their home. Immigration Judge (IJ) Hearing Tr. 21 (Admin. R. 63); see *id.* at 23a; Admin. R. 104 (letter from Gao's mother). Once, when Gao was visiting her family, Zhi followed her to the boat when she departed and thus allegedly deduced the identity of the city to which she had moved. *Ibid.* There was no evidence, however, that Zhi attempted to follow Gao or to locate her during the six months that

she lived in Mawei. Gao also testified that Zhi had threatened to have his uncle sue the family for his lost money. No lawsuit was ever filed though. *Id.* at 24a-25a; IJ Hearing Tr. 17, 22, 27-28 (Admin. R. 59, 64, 69-70). Gao further testified that she once had become "somehow concerned" when she heard that, "on one occasion [the uncle] took with him some people and make arrests for another individuals." IJ Hearing Tr. 28 (Admin. R. 70).

When Gao told her mother that she refused to marry Zhi, her mother paid a smuggler to bring her to the United States. App., *infra*, 24a. When asked why she did not "just relocate to somewhere else in China," she replied that she "thought about going to some other places," but she heard about people coming to the United States and "eventually I wanted to come to the United States." IJ Hearing Tr. 24 (Admin. R. 66). "And," she added, "I heard the other people say you could apply for political asylum here." *Ibid.*

In addition to her testimony, Gao submitted a State Department report that noted a problem in China of widespread domestic violence and "trafficking in brides and prostitutes." App., *infra*, 3a-4a. The report further explained that the central government was attempting to prevent such trafficking, but that it was impeded by official corruption and occasional resistance by local officials. *Ibid.*

3. The immigration judge held that Gao was removable as charged and denied her applications for asylum and withholding of removal. App., *infra*, 20a-26a.[1] The

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[1] The immigration judge also denied her application for withholding of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85. See App., *infra*, 4a, 26a.

immigration judge found that the alleged persecution was, in fact, "clearly a dispute between two families" over the broken contract, and that Zhi's anger was the product of losing "both his potential bride and his money." *Id.* at 24a. The immigration judge also rejected Gao's argument that the government could not protect her against Zhi's efforts to force the marriage to go through, holding that "the record does not establish that." *Ibid.* The immigration judge reasoned that Zhi's threat to have his uncle sue the family "does not establish that the government would not protect her," and that it is all "speculation" in any event because no lawsuit was ever brought. *Id.* at 24a-25a.

With respect to Gao's assertion that she was a member of a particular social group of "females who are in arranged marriages," the immigration judge determined that there was no "immutable characteristic that she is unable or unwilling to change." App., *infra*, 25a. The immigration judge said nothing more about that issue. Finally, the immigration judge held that the record established that Gao "was able to relocate safely to another city," and thus that there was no evidence demonstrating that it was "necessary for [Gao] to come all the way to the United States to be safe from this man." *Ibid.*

4. Gao appealed to the Board of Immigration Appeals, arguing that she was persecuted on account of her membership in a particular social group composed of "young women of Fuchow ethnicity, who have not [*sic*] had traditional marriage, arranged by parents and go-between, as practiced by that Fuchow ethnicity, and who oppose the arrangement and who do not have protection against it." Gao BIA Br. 6-7 (Admin. R. 10-11). The

Board summarily affirmed "the results of the decision below" without opinion. App., *infra*, 19a.

5. The court of appeals reversed. App., *infra*, 1a-18a. The court first held, without record citation, that Gao lived in a region of China where "parents routinely sell their daughters into marriage, and this practice is sanctioned by society and by the local authorities." *Id.* at 2a. The court then held that Gao was a member of a particular social group, which the court defined as consisting of women who have been "sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable." *Id.* at 14a. In so holding, the court noted that the immigration judge (i) had "failed to apply the correct definition of the 'particular social group' ground," *id.* at 2a, (ii) had "failed to analyze" whether Gao had established that she faced persecution on account of some immutable characteristic or otherwise to address her particular social group claim, *id.* at 15a, and (iii) had not "explained" why this dispute between the families over the marriage arrangement did not establish that Gao was a refugee, *ibid.* In addition, in the court's view, "[b]ecause the [immigration judge]'s analysis of the 'particular social group' issue is (to say the least) sparse," no deference was due to the immigration judge's decision. *Id.* at 15a-16a.

The court then held that Gao had established that "she might well be persecuted in China—in the form of lifelong, involuntary marriage," App., *infra*, 14a, because "the possibility remains that if [the family] continue[s] to be unable to repay his money, Zhi will force Gao to marry him," *id.* at 15a. The court further concluded that this form of persecution would be "on ac-

count of" Gao's membership in the particular social group of women in "forced marriages." *Id.* at 14a.

With respect to the question whether Zhi's private conduct amounted to persecution by the government or individuals the government was unable or unwilling to control, the court held that there was no substantial basis for the immigration judge's rejection of Gao's argument that the government would not protect her. App., *infra*, 16a-17a. The court criticized the immigration judge for "fail[ing] to mention" the State Department report about trafficking in women for marriage and prostitution. *Id.* at 16a. Given that report—together with Gao's testimony that Zhi's uncle had once had individuals arrested and the lack of evidence that local officials "*would* protect [Gao]"—the court concluded that respondent's contention "was not the least bit speculative." *Ibid.*

Finally, the court of appeals overturned the immigration judge's factual finding that Gao could safely relocate elsewhere in China to avoid Zhi. The court held that finding to be "contradicted by the record," because Zhi had followed her to a boat once and thus knew that she lived somewhere in Mawei and because Zhi had harassed her parents to either return the money or fulfill the contract. App., *infra*, 17a.[2]

REASONS FOR GRANTING THE PETITION

The decision of the Second Circuit usurps the Executive Branch's statutorily assigned role in interpreting and enforcing the immigration laws, and its constitution-

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[2] The court of appeals denied the government's petition for rehearing and rehearing en banc, which sought further review based on the panel's departure from *Ventura* and *Thomas*. See App., *infra*, 27a-28a; see also Gov't Pet. for Reh'g 7-15.

ally assigned role in making the sensitive domestic and foreign-policy judgments that inhere in identifying which categories of individuals may receive refuge in the United States from persecution in their home land. The court's decision defies the most basic rules for judicial review of agency action and, in so doing, flatly conflicts with this Court's decisions in *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006) (per curiam), and *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam), which both summarily reversed court of appeals' decisions that similarly preempted the Board's consideration of important questions of asylum law. The court of appeals' error is especially significant because it reached out to identify a broad new category of aliens (women in arranged marriages) entitled to seek asylum—a decision that has far-reaching ramifications for immigration policy in light of the fact that approximately 60% of marriages worldwide are arranged.

1. The decision of the court of appeals appropriated for the judiciary a task—the interpretation and application of the immigration law in asylum cases—that "Congress has exclusively entrusted" to the Executive Branch in the first instance, *Ventura*, 537 U.S. at 16 (quoting *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943)). That decision cannot be reconciled with this Court's recent ruling in *Thomas*, *supra*, which summarily reversed the court of appeals for committing the same error that occurred here. In that case, the Ninth Circuit reached out to hold in the first instance that an individual family may, and did, constitute a "particular social group" within the meaning of the INA and was harmed on that account. 126 S. Ct. at 1614. This Court explained that the court of appeals' error was "'obvious in light of *Ventura*,' itself a summary reversal." *Ibid.*

In so holding, this Court reiterated and reemphasized its holding in *Ventura* that, "[w]ithin broad limits," federal immigration law "entrusts the agency to make the basic asylum eligibility decision." *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16). "A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *Ibid.* (quoting *Ventura*, 537 U.S. at 16, which in turn quoted *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985)). Rather, "the function of the reviewing court ends when an error of law is laid bare." *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). At that juncture, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16, which in turn quoted *Florida Power & Light*, 470 U.S. at 744). A "judicial judgment cannot be made to do service for an administrative judgment." *Ibid.* (quoting *Ventura*, 537 U.S. at 16, which in turn quoted *Chenery Corp.*, 318 U.S. at 88).

Here, just as the Ninth Circuit did in *Thomas*, the Second Circuit has reached out to mint a new and controversial rule of immigration law that permits individuals to qualify for asylum and withholding of removal based on their involvement in an arranged marriage and the attendant familial or cultural pressure to participate in the marriage—or at least to choose between getting married or repaying the other party the money received in anticipation of the marriage. The court's opinion confesses that it did so despite, or perhaps because, the immigration judge had "failed to analyze" the question and had not "explained" her reasoning, and her consider-

ation of the question was "to say the least[,] sparse." App., *infra*, 15a (parentheses omitted). The Board, moreover, had summarily affirmed the "results" of the immigration judge's decision, with no independent analysis. *Id.* at 19a.

Under *Thomas* and *Ventura*, it is clear that, in these circumstances, once the court of appeals identified deficiencies in the agency decision, the court "should have applied the 'ordinary remand rule,'" *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 18), and allowed the Board to decide, in the first instance, whether and when individuals in an arranged marriage or an anticipatory arranged marriage constitute a "particular social group" under the INA. Instead, the court proceeded to resolve that threshold legal question definitively, thereby establishing circuit-wide precedent with sweeping implications for immigration law.

2. The Second Circuit's disregard of this Court's decisions in *Ventura* and *Thomas*, and the fundamental principles of judicial review and restraint that they enforce, did not stop there. The court went on to hold both that Gao had established that she might be "persecuted" in China—"in the form of lifelong, involuntary marriage," App., *infra*, 14a. Reaching out further still, the court also held that the persecution was "on account of" her membership in the court's newly identified particular social group of women "sold * * * into forced marriages," *ibid.* See *id.* at 14a-16a. The court decided both of those questions even though the agency had not addressed either issue. Indeed, the agency had no occasion to do so, having already held that the mere dispute between the families over the marriage arrangement did not render Gao a refugee and that Gao did not fall within any protected class. *Id.* at 24a-25a.

The court's holding that Gao had established a prospect of "persecution" in the form of a contingent risk of a "lifelong, involuntary marriage" raises significant issues of immigration and foreign policy. The court reached that conclusion on the basis of a record that shows nothing more than an arranged future marriage of a sort that is prevalent in much of the world. See pp. 19-22, *infra*.

The court of appeals' conclusion that a contingent future event can amount to "persecution" is also of substantial concern. In rejecting the immigration judge's conclusion that Gao did not face the requisite risk of persecution, the court acknowledged and accepted the immigration judge's finding that it was Gao's parents' breach of the contract and refusal to repay Zhi his money that "caused the anger of the boyfriend in this situation." App., *infra*, 15a; see IJ Hearing Tr. 22 (Admin. R. 64) (Gao testifies that, "[b]ecause my family took his money at the time of the engagement * * * he could sue my family as cheating him for the money."). The court nevertheless held that Gao herself faced persecution on account of her status in a prospective arranged marriage because "the possibility remains that *if they continue to be unable to repay his money*," then "Zhi will force Gao to marry him." App., *infra*, 15a (emphasis added). In other words, in the court's view, a "possibility" of persecution that is itself contingent upon a separate event can constitute "persecution" "on account of" a protected status.

The court of appeals' conclusions regarding the nature of "persecution" "on account of" a protected status were made without any consideration or analysis by the Board and without any citation of any Board precedent or any other principle of immigration law. As with the

court of appeals' independent resolution of the "particular social group" question, discussed below, the implications of that decision trigger all of the concerns about limitations on the judicial role and respect for agency expertise that are embodied in the ordinary remand rule of *Thomas* and *Ventura*. Whatever the proper resolution of those novel questions, the expert agency should have the opportunity to consider them in the first instance.

3. The Second Circuit's violation of the ordinary remand rule with respect to the "particular social group" issue was especially pointed because it framed the social group it identified in terms that had not been argued to, let alone considered by, the agency. Before both the immigration judge and the Board, Gao argued that she was a member of a social group consisting of females (or females within her geographical region) in "arranged marriages." App., *infra*, 25a; see Gao BIA Br. 6-7. Only in the court of appeals did the asserted social group get transmogrified into women "sold into * * * forced marriages," App., *infra*, 14a. That reformulation of the alien's claim transgressed established rules of administrative review in four respects.

a. First, the court of appeals' reformulation of Gao's social group from women anticipating an arranged marriage to women "sold into * * * [a] forced marriage[]," App., *infra*, 14a, defied the record before the agency. The immigration judge specifically found—and the court of appeals did not overturn the findings—that (i) "at first" Gao considered Zhi to be "a rather acceptable potential husband," *id.* at 23a; (ii) when Gao decided to cancel the engagement, she was able to get a job and move away from both home and Zhi, *ibid.*; (iii) Gao's family, rather than forcing her to marry, actually helped

her to leave for the United States, *ibid.*; and (iv) none of Zhi's threats to force the marriage or sue the family ever materialized, *id.* at 24a-25a.

Thus the court of appeals' conclusion that the combination of an arranged marriage contract (which can be fully consistent with cultural tradition) and an effort to renege or cancel the contract constitutes being "sold into" a "forced marriage[]," underscores the potential sweep of the court's newly created particular social group. It also magnifies the court's disregard of established principles of administrative review that require not only that "the basic asylum eligibility decision" be made by the agency in the first instance, *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16), but also that courts not reach out to decide factual or legal questions that were not squarely presented to the agency and are not supported by the administrative record. Cf. *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992).

b. Second, by recognizing a potentially expansive "particular social group" that had not been squarely presented to or analyzed by the Board, the court of appeals supplanted the Attorney General's statutorily assigned authority and long-established expertise in interpreting federal immigration law. See 8 U.S.C. 1103(a)(1) (Supp. IV 2004) (the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"); 8 U.S.C. 1158(b)(1)(A) (eligibility for asylum turns on whether the "Attorney General determines" that the criteria have been satisfied); 8 U.S.C. 1231(b)(3)(A) (eligibility for withholding turns on what the "Attorney General decides"); see also *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context.").

Indeed, at the same time that the Second Circuit imposed its own conception of particular social group in this case, the Board was in the process of clarifying the *Acosta* definition of particular social group. See *In re C-A-*, 23 I. & N. Dec. 951, 960 (BIA 2006). In so doing, the Board concluded that one "important element in identifying the existence of a particular social group" is the "recognizability" and "social visibility[] of the group in question." *Id.* at 959-960. In other words, a particular social group should have a distinct and visible social identity within the country "recognizable by others in the community," and that identity "cannot be defined exclusively by the fact that its members have been subjected to harm." *In re A-M-E-*, 24 I. & N. Dec. 69, 74 (BIA 2007); see *In re C-A-*, 23 I. & N. Dec. at 960.

The Board has further held that the group must be at "greater risk" of differential treatment because of its social visibility and distinctness, and the group must be defined with "particularity" so as not to sweep in indiscriminately broad swaths of the population. *In re A-M-E-*, 24 I. & N. Dec. at 74, 76; see *id.* at 76 (rejecting the use of wealth to define a particular social group because it could sweep in "as much as 20 percent of the population or more").

Had the court of appeals remanded the question of whether and when persons in prospective arranged marriages might constitute a particular social group to the Board, as required by the "ordinary 'remand' rule" of *Thomas* and *Ventura*, see *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 18), the Board would have had the opportunity to apply its expertise in construing the INA and determining, for example, the proper role of United Nations interpretations in applying United States law in the course of addressing Gao's social group

claim, see *Aguirre-Aguirre, supra*; cf. *In re A-M-E-*, 24 I. & N. Dec. at 74; *In re C-A-*, 23 I. & N. Dec. at 956. The Board would also have had the opportunity to decide whether the social group proposed by the court would have sufficient particularity, given that, in countries like India, approximately 96% of all marriages are arranged. The Board simply cannot perform its statutorily assigned role of interpreting the INA in the first instance if courts of appeals are free to adopt different standards on their own and, in the process, unravel the Board's law. See *In re A-M-E-*, 24 I. & N. Dec. at 75 n.7 (noting the discrepancy and tension between the Second Circuit's decision in this case and the Board's criteria for "particular social group").

c. Third, the court of appeals' preemption of the agency's opportunity to consider whether and when prospective or completed arranged marriages become forced marriages, and whether and when persons in or facing forced marriages constitute a particular social group, deprived the Board of the opportunity to bring its substantial expertise to bear on not just the law, but also the sensitive foreign policy and cultural questions implicated by the broad variety of marriage traditions and practices that exist worldwide.

For example, the Department of Homeland Security has informed this Office that approximately 60% of marriages worldwide are arranged and, in some countries, virtually all marriages are arranged.[3] The court of appeals, however, defined its particular social group (and

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[3] Although rare, arranged marriages also occur within the United States. One article explains that "[a]rranged marriage is the norm in many ultra-Orthodox communities." Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 Law & Soc. Inquiry 383, 408 (2006).

found a reasonable fear of persecution on account of an arranged marriage) without the creation of any agency record or any agency findings addressing the prevalence and variety of arranged marriage practices or their enforcement. Moreover, the court of appeals was quick to equate arranged marriages with women being sold into forced marriages—and, in an even bigger logical leap, to equate them with the type of human kidnapping and trafficking that the State Department Report addressed and on which the court repeatedly relied, App., *infra*, 3a-4a, 16a; see Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *China—Country Reports on Human Rights Practices—2001*, at 24, 32-33 (Mar. 4, 2002) (Admin. R. 130, 138-139).

Had the Board been given the opportunity to address the court's proposed social group, those critical distinctions could have been fleshed out and the Board's unique expertise employed. As *Ventura* contemplates, remand also could have led "to the presentation of further evidence," 537 U.S. at 18, including a State Department report explaining that "[a]rranged marriages have been a long-standing tradition in many cultures and countries," and that there is a "clear distinction between a forced marriage and an arranged marriage." 7 Department of State, *Foreign Affairs Manual* § 1459(b) (2005); see Ratna Kapur, *Travel Plans: Border Crossings and the Rights of Transnational Migrants*, 18 Harv. Hum. Rts. J. 107, 123 (2005) (distinguishing forced marriages from arranged marriages in analyzing immigration policy in the United Kingdom).

Furthermore, while the court of appeals assumed that membership in its social group would be limited to women, App., *infra*, 14a, the court offered no explanation for why men who allege that they were socially

pressured into such marriages would not enjoy similar protection. Indeed, the Second Circuit recently went even further than that, directing the Board to consider, in light of its decision in this case, whether the boyfriends of women facing arranged marriages with other men are also members of a particular social group. See *Tang* v. *Gonzales*, 200 Fed. Appx. 68 (2006).

The potentially far-reaching implications of the Second Circuit's decision do not stop there. The immigration law also *prohibits* the Attorney General from granting asylum or withholding of removal to any person who has "assisted, or otherwise participated in the persecution of any person" on account of, *inter alia*, that person's "membership in a particular social group." 8 U.S.C. 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). The court of appeals' decision thus threatens to expand the statutory bar on asylum and withholding to individuals who become involved in "a dispute between two families" arising out of an arranged marriage, App., *infra*, 24a, notwithstanding broad cultural and religious acceptance of such arrangements in the country of origin.

Beyond that, the court stressed in the decision below that its ruling "does not reflect any outer limit of cognizable social groups," and expressly raised and reserved the question whether all "young, unmarried women in rural China comprise a 'particular social group,' " given the court's findings about the prevalence of the practice of arranged marriages. App., *infra*, 14a n.6. As a result, the implications of the court's decision for immigration policy would be difficult to overstate.

d. Fourth and relatedly, the court of appeals lacked the Executive Branch's experience in international relations, and thus was ill-equipped to tackle the complex question of the implications of arranged-marriage prac-

tices for United States immigration law and policy. The Constitution charges the Executive Branch, not the courts, with conducting the Nation's foreign affairs. See *Regan* v. *Wald*, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)). Indeed, this Court has recognized that construing the scope of asylum law is an "especially sensitive political function[] that implicate[s] questions of foreign relations." *Aguirre-Aguirre*, 526 U.S. at 425 (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988)).

Given the prevalence of arranged marriages and the deep roots of such practices in the cultures and religions of a number of foreign nations, determining whether the circumstances surrounding such marriages might establish a particular social group—and amount to a form of "persecution"—requires the type of "highly complex and sensitive" judgment that only the political branches can make. *Ventura*, 537 U.S. at 17. The Second Circuit was "not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *Aguirre-Aguirre*, 526 U.S. at 425. As a result, the court of appeals did not and institutionally could not grapple with the foreign affairs and immigration policy implications of declaring arranged marriages—especially attempted arrangements that entail only a resulting contract dispute and the minimal social pressure documented in the record here—to be a form of persecution so severe as to qualify its participants as "refugees" under United States law.

The ordinary remand rule reinforces that fundamental principle of separation of powers, and the consider-

ations that "classically support[] the law's ordinary remand requirement" clearly applied here. *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 17). "The agency [could] bring its expertise to bear" on the questions of whether or when individuals in or facing arranged marriages qualify as members of a particular social group and whether they suffer "persecution" within the meaning of the INA. In addition, on remand, the agency could develop the record and "evaluate the evidence," and could "make [the] initial determination" of the proper interpretation of the INA "through informed discussion and analysis," and through application of its substantial expertise in matters of immigration and foreign policy, which are so acutely implicated by the social group claimed here. *Ibid.*

In sum, as in *Ventura* and *Thomas*, the scope and implications of the court's disregard of this Court's precedent merits this Court's review. In light of this Court's recent summary reversal of the Ninth Circuit in *Thomas* for committing the same failure-to-remand error and the Court's explication in that case of the proper role of judicial review, the Court should grant the petition for a writ of certiorari in this case, vacate the judgment below, and remand for reconsideration in light of *Thomas*. That is the course the Court recently took in *Gonzales* v. *Tchoukhrova*, 127 S. Ct. 57 (2006), which presented an analogous departure from the ordinary remand rule. Because of the sweeping implications of the court of appeals' decision and its potential effect on the proper administration of immigration law and policy, a similar disposition is warranted here.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to that court for further consideration in light of *Gonzales* v. *Thomas*, 126 S. Ct. 1613 (2006).

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

DONALD E. KEENER
MARGARET PERRY
Attorneys

MARCH 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 04-1874-ag

HONG YING GAO, PETITIONERS

v.

ALBERTO GONZALES[1]

Submitted: Jan. 30, 2006
Decided: Mar. 3, 2006

OPINION

STRAUB, Circuit Judge.

Petitioner Hong Ying Gao ("Gao") petitions for review of a Board of Immigration Appeals ("BIA") decision summarily affirming an Immigration Judge's ("IJ") denial of her claims for asylum, withholding of removal, and protection under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, S. Treaty Doc. No.100-20 (1988), 1465 U.N.T.S. 85. Gao argues that the IJ erred in finding that she did not have a well-founded fear of forced marriage and in

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[1] United States Attorney General Alberto Gonzales is substituted as Respondent. *See* Fed. R. App. P. 43(c)(2).

finding that a forced marriage, even were it to occur, would not constitute persecution under paragraph 1101(a)(42) of Title 8 of the United States Code, which sets forth the grounds for establishing asylum eligibility.

We agree with Gao that the IJ, in finding that Gao's problems were not "on account of" a legally protected ground, failed to apply the correct definition of the "particular social group" ground as established by BIA and judicial precedent. As this precedent makes clear, the statutory term "particular social group" is broad enough to encompass groups whose main shared trait is a common one, such as gender, at least so long as the group shares a further characteristic that is identifiable to would-be persecutors and is immutable or fundamental. We further find that the IJ's decision was based, in part, on certain factual conclusions reached without substantial evidence: namely, that the government might be willing and able to protect Gao and that Gao could internally relocate within China. Accordingly, we remand for further proceedings.

BACKGROUND

I. Factual History

Because the IJ found Gao to be credible, we take as true the facts Gao presented to the IJ. *See Bocova v. Gonzales*, 412 F.3d 257, 262-63 (1st Cir. 2005). Gao, who was twenty years old when she left China, grew up in a rural village in the Fujian Province. In this region of China, parents routinely sell their daughters into marriage, and this practice is sanctioned by society and by the local authorities.

When Gao was nineteen years old, her parents, through a broker, sold Gao to a man named Chen Zhi; in

return for an up-front payment of 18,800 RBM, Gao's parents promised that Gao would marry Zhi when she turned twenty-one. Gao's parents used this money to pay off previous debts. At first, Gao acquiesced in the arrangement under pressure from her parents. However, because Zhi soon proved to be bad-tempered, and gambled, and beat her when she refused to give him money, Gao decided that she did not want to marry Zhi. When Gao tried to break their engagement, Zhi threatened her. He also threatened that, if she refused to marry him, his uncle, a powerful local official, would arrest her. Gao had heard that Zhi's uncle had arrested other individuals for personal reasons, and so she was afraid the same would happen to her.

To escape Zhi, Gao moved an hour away by boat and took a job in the Mawei district of Fuchou. Zhi continued to visit Gao's family and demand that she marry him, and when her parents refused to tell him where she had moved, he vandalized their home. Zhi also figured out that Gao was living in Mawei by following her to her boat one night when she was returning from a visit with her family. About half a year later, Gao fled to the United States out of fear that, if she remained in China, she would be forced to marry Zhi. Since Gao left, Zhi and his cohorts have continued to harass her family, to the point where the family has had to move repeatedly.

II. Procedural History

At her hearing, Gao testified to the events described above. In addition to Gao's testimony and a corroborating affidavit from her mother, the IJ had before her the 2001 State Department Country Report on Human Rights Practices in China ("Country Report"), which described widespread domestic violence and trafficking in

brides and prostitutes. The Country Report explained that this problem is fueled by the gender imbalance that has resulted from selective abortions and infanticides of female offspring, and that the problem is worse in rural areas. The Country Report also stated that, although the central government has been trying to prevent trafficking in women, its efforts have been hampered by official corruption and by active resistance on the part of village authorities.

At the end of the hearing, the IJ issued an oral decision denying Gao asylum, withholding of removal, and CAT relief. The IJ found Gao credible, but concluded that Gao had not made out a claim for asylum or withholding of removal. Specifically, the IJ found that Gao's predicament did not arise from a protected ground such as membership in a particular social group, but was simply "a dispute between two families." The IJ also found that the record did not establish that the government would not protect her from Zhi. Finally, the IJ found that because Gao "was able to relocate safely to another city," she did not need asylum in the United States. The IJ also, without separate analysis, denied Gao's CAT claim. The BIA summarily affirmed.

DISCUSSION

I. Standard of Review

We review *de novo* the IJ's determination of mixed questions of law and fact, as well as the IJ's application of law to facts. *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003). We review BIA interpretations of ambiguous Immigration and Nationality Act language—such as the meaning of "particular social group"—with the deference described in *Chevron U.S.A. Inc. v. Natu-*

ral Res. Def. Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). We do not, however, give *Chevron* deference to summary BIA affirmances of *IJ* interpretations. *See Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 190-91 (2d Cir. 2005).[2]

By contrast, the scope of our review of an IJ's factual findings is narrow, and we uphold such findings so long as they are supported by "substantial evidence." *Jin Shui Qiu v. Ashcroft*, 329 F.3d 140, 148 (2d Cir. 2003) (internal quotation marks omitted). The "substantial evidence" standard, however, is slightly stricter than the clear-error standard generally applied to a district court's factual findings. *Id.* at 149. We require "more than a mere scintilla" of evidence, or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Alvarado-Carillo v. INS*, 251 F.3d 44, 49 (2d Cir. 2001) (internal quotation marks omitted). We also "require some indication that the IJ considered material evidence supporting a petitioner's claim." *Poradisova v. Gonzales*, 420 F.3d 70, 77 (2d Cir. 2005); *see also Anderson v. McElroy*, 953 F.2d 803, 806 (2d Cir. 1992) ("[W]e cannot assume that the BIA considered factors that it failed to mention in its decision."

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[2] This Court has not yet decided whether IJ decisions are ever entitled to a lesser form of deference: "*Skidmore* deference." *See Shi Liang Lin*, 416 F.3d at 191 (noting this open question). Under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944), individual agency interpretations carry persuasive power based on "the thoroughness evident in [their] consideration, the validity of [their] reasoning, [and their] consistency with earlier and later pronouncements." As explained below, the present case does not require us to resolve this issue because the *Skidmore* factors would not counsel deference to the particular IJ decision at issue.

(internal quotation marks omitted)). It is not our role, moreover, to assume factual findings supporting denial "on the basis of record evidence not relied on by the BIA." *Jin Shui Qiu*, 329 F.3d at 149.

Applying these principles here, we review *de novo* the IJ's interpretation of the legal term "particular social group"; assume without deciding that the IJ's interpretation might be entitled to *Skidmore* deference based on its inherent persuasiveness; accord *Chevron* deference to relevant BIA precedent; and review under the "substantial evidence" standard the IJ's findings of fact as to whether Gao could have sought government protection and/or relocated within China.

To establish eligibility for the discretionary relief of asylum, a petitioner must show that she has suffered past persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion," or that she has a well-founded fear of future persecution on these grounds. *See* 8 U.S.C. 1101(a)(42). "An alien's fear may be well-founded even if there is only a slight, though discernible, chance of persecution." *Diallo v. INS*, 232 F.3d 279, 284 (2d Cir. 2000) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987)). If an applicant satisfies the higher burden of demonstrating that such persecution is more likely than not, she is automatically entitled to withholding of removal under 8 U.S.C. § 1231(b)(3). *See Diallo*, 232 F.3d at 284-85. An applicant is also entitled to CAT relief if she establishes that it is more likely than not that she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2); *see Ramsameachire v. Ashcroft*, 357 F.3d 169, 184 (2d Cir. 2004).

The three issues in this case, which we address in turn, are: 1) whether Gao established that she might be forced into marriage "on account of . . . membership in a particular social group"; 2) whether the IJ had a substantial basis for finding insufficient evidence that the Chinese authorities would not protect Gao; and 3) whether the IJ had a substantial basis for finding that Gao could safely relocate within China. The government appears to concede, as it must, that forced marriage is a form of abuse that rises to the level of persecution. Moreover, as the IJ and BIA failed to address Gao's CAT claim, we simply remand that claim for consideration by an IJ or the BIA in the first instance.

A. Particular Social Group

The five grounds protected under paragraph 1101(a)(42)—race, religion, nationality, membership in a particular social group, and political opinion—derive verbatim from the United Nations Protocol Relating to the Status of Refugees ("Protocol"), Jan. 31, 1967, 19 U.S.T. 6223 (entered into force Nov. 1, 1968); Congress expressly modeled its law on the Protocol so that the two would be "consistent." H. R. Rep. No. 781, at 20 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 160, 161. Of the various categories, "particular social group" is the least well-defined on its face, and the diplomatic and legislative histories shed no light on how it was understood by the parties to the Protocol or by Congress. There is, fortunately, a substantial body of case law, although its value as precedent is somewhat limited by the fact-specific nature of asylum cases.

The landmark BIA case for what can constitute a social group is *Matter of Acosta*, which, in the context of holding that Salvadoran taxi drivers were not a cogniz-

able social group because they could change professions, set forth the following standard:

> [W]e interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share *a common, immutable characteristic. The shared characteristic might be an innate one such as sex,* color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

19 I. & N. Dec. 211, 233-34 (BIA 1985) (emphasis added), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); *see also In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 358 (BIA 1996) (recognizing as a particular social group "young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice"); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (BIA 1990) (recognizing Cuban homosexuals as a particular social group); *cf. Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988) (recognizing that former members of the Salvadoran national police could comprise a particular social group, but finding insufficient evidence of future danger).

Courts of Appeals have deferred to *Matter of Acosta*'s broad interpretation of "particular social group" as encompassing any group, however populous, persecuted because of shared characteristics that are either immutable or fundamental. In *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993), for example, then-Judge Alito writing for the Third Circuit considered and rejected a petition by an Iranian woman who had been living in Iran since before the Islamic revolution and who claimed that, if she were removed to Iran, she would be forced to conform to fundamentalist Islamic norms. *Id.* at 1235-36. The court reasoned thus:

> We believe that there are three [elements that an alien must establish in order to qualify for withholding of deportation or asylum based on membership in such a group]. The alien must (1) identify a group that constitutes a "particular social group" within the interpretation just discussed, (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.

In the excerpt from *Acosta* quoted above, the Board specifically mentioned "sex" as an innate characteristic that could link the members of a "particular social group." Thus, to the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted. She has not, however, satisfied the third element; that is, she has not shown that she would suffer or that she has a well-founded fear of suffering "persecution" based solely on her gender.

Id. at 1240. The court reached this last conclusion because there was no record evidence that women in Iran were systematically persecuted *for being women. Id.* at 1241.

The *Fatin* court went on to consider Fatin's suggestion that her social group was "those Iranian women who find those laws so abhorrent that they refuse to conform—even though, according to the petitioners' brief, the routine penalty for noncompliance is 74 lashes, a year's imprisonment, and in many cases brutal rapes and death." *Id.* (internal quotation marks omitted). The court agreed that this "may well" be a cognizable social group under the asylum law but found that Fatin had not demonstrated that she was part of such a social group because she was not politically active here, testified that she would try to avoid complying with the government's dress code and other norms but not that she would take any risk necessary, and failed to establish that the new Iranian norms were abhorrent to her, as opposed to merely objectionable. *Id.* at 1241-42.

The reasoning in *Fatin* may be taken to suggest that the proper balance to strike is to interpret "particular social group" broadly (requiring only one or more shared characteristics that are either immutable or fundamental) while interpreting "on account of" strictly (such that an applicant must prove that these characteristics are a central reason why she has been, or may be, targeted for persecution). As the Tenth Circuit explained in *Niang v. Gonzales*, "the focus with respect to [gender-related] claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that

they are persecuted 'on account of' their membership." 422 F.3d 1187, 1199-1200 (10th Cir. 2005) (quoting 8 U.S.C. § 1101(a) 42(A)).

Other circuits have also deferred to *Matter of Acosta's* broad definition of "particular social group." *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (recognizing as a "particular social group" in Mexico gay men with female sexual identities, and holding "that a 'particular social group' is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it"); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998) (recognizing parents of political dissidents as "particular social group" under *Matter of Acosta's* immutability test); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (recognizing petitioner's family as a "particular social group").[3] Courts of Appeals have also followed

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[3] We also note that the Department of Homeland Security ("DHS") has recently taken a similar stance in *Matter of R-A-*. Initially, the BIA held, reversing an IJ, that a Guatemalan woman facing domestic abuse was not facing persecution on account of social group membership. 22 I. & N. Dec. 906 (BIA 1999). Then-Attorney General Janet Reno overturned the decision, proposed new regulations for gender-related asylum claims (affirming that gender can be a sufficiently unifying characteristic), and ordered the BIA to reconsider the case after these regulations were finalized. While these regulations have not yet been finalized, DHS has since argued in a brief to the Attorney General that he should grant *R-A-* asylum under the *Matter of Acosta* standard. *See* Department of Homeland Security's Position on Respondent's Eligibility for Relief, Feb. 19, 2004, *available at* http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf (visited Feb. 10, 2006). Specifically, the DHS now takes the position that "married women in Guatemala who are unable to leave the relationship" are a particular social

the BIA's holding in *In re Fauziya Kasinga*, 21 I. & N. Dec. at 358, that young women who reasonably fear customary genital mutilation are eligible for asylum under the "particular social group" rubric. *See Mohammed v. Gonzales*, 400 F.3d 785, 796-98 (9th Cir. 2005); *Niang*, 422 F.3d at 1199-1200; *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004). Although this Court has not had occasion to consider *de novo* whether women facing genital mutilation could comprise a "particular social group," we did find an applicant eligible for asylum based on her fear of genital mutilation in a case where the BIA *conceded* that the alleged harm was on account of Abankwah's social group but found that she had not presented sufficient proof of past or future harm. *See Abankwah v. INS*, 185 F.3d 18, 21 (2d Cir. 1999); *accord Balogun v. Ashcroft*, 374 F.3d 492, 499 (7th Cir. 2004) (noting agency concession).

The general law in our own Circuit on particular social groups is less clear. In *Gomez v. INS*, we denied the petition of a woman whose asylum claim was based on the fact that she had been raped and beaten by guerilla forces on five different occasions between the ages of twelve and fourteen. 947 F.2d 660, 664 (2d Cir. 1991). Gomez argued that, because of her past, she belonged to a particular social group—"women who have been previously battered and raped by Salvadoran guerillas" that was likely to be singled out for further persecution. *Id.* at 663-64. In rejecting this argument, we used broad language that could (and has) been read as conflicting with *Matter of Acosta*, *see, e.g.*, *Niang*, 422 F.3d at 1199.

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group under the law. *Id.* at 27-28. The Attorney General remanded the case to the BIA in January 2005, *see Matter of R-A-*, 23 I. & N. Dec. 694 (AG 2005), where it is currently pending.

In particular, in our general statement of law, we wrote that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." *Gomez*, 947 F.2d at 664; [4] *see also Saleh v. U.S. Dept. of Justice*, 962 F.2d 234, 240 (2d Cir. 1992) (citing *Gomez*, and rejecting as potential social groups "Yemeni Moslems residing outside of Yemen" and "poor Yemenis who could not afford to pay 'blood money' to buy their way out of a death sentence [for murder]")).

However, in the analysis portion of *Gomez*, this Court rejected Gomez's claim not because the social group she defined was too "broadly-based" but rather because "there is no [indication] that Gomez *will be singled out* for further brutalization on [the basis of her past victimization]." 947 F.2d at 664 (emphasis added). In other words, *Gomez* can reasonably be read as limited to situations in which an applicant fails to show a *risk* of future persecution on the basis of the "particular social group" claimed, rather than as setting an *a priori* rule for which social groups are cognizable. Indeed, the former reading would appear to conform better to the BIA's reasonable interpretation of 8 U.S.C. § 1101(a)(42) in *Matter of Acosta* and the consensus among the other circuits.[5]

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[4] We based this statement on a formulation from the Ninth Circuit which that court has since disavowed as dicta and as inconsistent with BIA and other circuit precedent. *See Gomez*, 947 F.2d at 664 (citing *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986)); *Hernandez-Montiel*,225 F.3d at 1092-93 & n.5 (disavowing *Sanchez-Trujillo*).

[5] The fear of future persecution, both subjective and objective, is evaluated with respect to the specific individual who asserts that fear. To the extent that the social group of which the petitioner claims to be a member is exceptionally broad, the need for the individual to prove

We need not decide the exact scope of *Gomez* here because Gao belongs to a particular social group that shares more than a common gender. Gao's social group consists of women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable.[6] Clearly, these common characteristics satisfy the *Matter of Acosta* test. Moreover, Gao's testimony, which the IJ credited, also establishes that she might well be persecuted in China-in the form of lifelong, involuntary marriage—"on account of" her membership in this group.

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that he, in particular, reasonably fears being persecuted is certainly greater. This can be done either by showing that a significant portion of even the very broad group will be persecuted, or by establishing that there are good reasons for thinking that the particular alien will be singled out for persecution. The need for such proof will depend, of course, on the nature as well as the breadth of the social group, e.g., it may be readily assumed in the circumstances of a particular country that virtually every individual in a racial or ethnic group may reasonably fear future persecution, even though the group is very large.

[6] To avoid unnecessary circularity or complexity, we choose this definition of Gao's group, rather than one that includes as an additional element that the individuals in question object to their compulsory marriage. Needless to say, however, if a victim ceases to object to her forced marriage and seeks United States residence purely for other reasons, then she is not, as the statute requires, "unable or unwilling to avail . . . herself of the *protection* of . . . [her country of origin] *because of* persecution or a well-founded fear of persecution." 8 U.S.C. § 1101(a)(42) (emphasis added).

We note, additionally, that our definition of Gao's social group is tailored to the facts of this case and does not reflect any outer limit of cognizable social groups. We do not here reach, for example, whether young, unmarried women in rural China comprise a "particular social group" under asylum law such that, if they have a well-founded fear of being forced into marriage, they are eligible for asylum

The IJ's reasons for reaching the opposite conclusion are unclear. The IJ recited the requirement that persecution be on account of "some immutable characteristic," yet failed to analyze whether such was the case here. The IJ appears to have concluded that Gao did not face persecution on account of an immutable characteristic because her situation arose from "a dispute between two families," but the logical connection between the IJ's premise and conclusion is not evident, nor is it explained in the IJ's opinion. The IJ also wrote that "[t]he other reason that [Gao] does not establish that she is a member of a particularly persecuted social group of female [sic] is because her mother violated the oral [marriage] contract that she had with this go-between, and that is what caused the anger by the boyfriend in this situation . . . ." To the extent the IJ might have reasoned that the financial arrangement between the *families* somehow precluded a finding that Zhi's motive in targeting *Gao* was discriminatory, we reject this logic as antithetical to the very notion of individual rights on which asylum law is based. While Zhi may have a legitimate *financial* claim against Gao's parents, the possibility remains that if they continue to be unable to repay his money, Zhi will force Gao to marry him.[7]

Because the IJ's analysis of the "particular social group" issue is (to say the least) sparse, we need not reach the issue of whether *Skidmore* deference to IJ interpretations is appropriate. Even if *Skidmore* defer-

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[7] Nor does it make any difference that Zhi is the only person likely to claim Gao as his property. The law does not distinguish between single persecutors and mobs, provided that the persecution is based on a specified ground and that the government is unable or unwilling to protect the victim(s).

ence is appropriate, the *Skidmore* factors—"the thoroughness evident in [an official interpretation], the validity of its reasoning, [and] its consistency with earlier and later pronouncements"—do not counsel deference here. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

For the reasons stated above, we hold that Gao has established a nexus between the persecution she fears and the "particular social group" to which she belongs. The only remaining questions, therefore, are whether the IJ had a substantial basis for finding that the government was willing and able to protect Gao or that Gao could reasonably relocate within China. We address these in turn.

B. Government Protection

The IJ found that Gao had not met her burden of establishing that the Chinese government would not protect her. In so finding, the IJ dismissed as "mere speculation" Gao's assertion that the government would not protect her from Zhi. We agree with Gao that this finding of fact was without substantial basis. The Country Report, which was included in the record before the IJ but which the IJ failed to mention in her opinion, states that trafficking in women, for marriage and prostitution, is widespread, and that official efforts to combat the problem have been hampered by corruption and by active resistence [*sic*] by village leaders. Given this evidence, together with the testimony that Zhi threatened to have his uncle, a powerful government official, arrest Gao and with the lack of any evidence that the local officials in Gao's village *would* protect her, Gao's contention was not the least bit speculative. *See Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 342

(2d Cir. 2006) ("[I]t is well established that private acts may be persecution if the government has proved unwilling to control such actions."). We therefore vacate this finding of fact.

C. Relocation Within China

The IJ also found, although it is unclear whether she gave this finding significant weight, that Gao could have relocated within China because she "was able to relocate safely to another city." This finding is contradicted by the record. As set forth above, Gao testified that, six months before she fled China, she attempted to escape Zhi by moving an hour away. She further testified that Zhi continued to harass her family, vandalized their home, and even followed her when she returned home to visit and thereby succeeded in figuring out that she had moved to Mawei. Given that Gao fled China soon after Zhi made this discovery and that Zhi continued to harass Gao's parents thereafter, the record in no way suggests that Gao "was able to relocate safely." We therefore vacate this finding and remand for further consideration of this issue (should the BIA deem it a significant one).

We remind the BIA that to deny a claim based on the availability of internal refuge, the BIA must find not only that Gao could avoid persecution by relocating, but *also* that "under all the circumstances it would be reasonable to expect the applicant to do so," 8 C.F.R. § 208.13(b)(2)(ii). The regulations, further, direct the BIA to consider, among other things, "whether the applicant would face other serious harm in the place of suggested relocation; . . . administrative, economic, or judicial infrastructure; geographical limitations; and

social and cultural constraints, such as age, gender, health, and social and familial ties." *Id.* § 208.13(b)(3).

CONCLUSION

For the foregoing reasons the petition for review is Granted, the decision of the BIA is Vacated, and the case is Remanded to the BIA for further proceedings consistent with this opinion. The motion for a stay of removal, previously granted, shall expire upon issuance of the mandate.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: [Mar. 15 2004]

FILE: A77-994-017 - NEW YORK

In Re: GAO, HONG YING

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Morry Cheng, Esquire

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. § 1003.1(e)(4).

/s/ *ILLEGIBLE*
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
New York, New York

File A 77 994 017

HONG YING GAO, PETITIONERS

v.

ALBERTO GONZALES, RESPONDENT

Jan. 24, 2003

CHARGE:

Section 212 (a) (7) (A) (i) (I) of the Immigration and Nationality Act, who did not have documents presented for admission to the United States.

APPLICATION:

Asylum, withholding of removal, and protection under the Convention Against Torture.

ON BEHALF OF RESPONDENT:

Morry Cheng, Esquire

ON BEHALF OF SERVICE:

Richard Van Veldhuisen, Esqure

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of China, born on December 8th 1980, making her approximately 22 years today the date of the hearing. She has been charged in the Notice to Appear, Exhibit 1, as an arriving alien without documents and I find that the Government has sustain their burden of establishing that she is removable as charged. She has admitted those allegations in a change of venue. Respondent has applied today for the relief of asylum, withholding of removal, and protection under the Convention Against Torture. I find that as an arriving alien, it is her burden of proof to establish clearly and beyond a doubt that she is entitled to be admitted to this country which she has failed to do. She has declined to designate a country of removal, and the Court will designate the People's Republic of China.

An applicant for asylum bears the burden of proof and persuasion. It's the application's burden to establish that they're eligible, that they're a refugee. *See Matter of Acosta*, 19 I&N Dec. 211 (BIA 1995). See also § C.F.R. Section 208.5; 8 C.F.R. Section 42.17c. An alien who is seeking a discretionary grant of asylum must demonstrate status as a refugee as defined by INA Section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). That definition includes the requirement the alien is unable or unwilling to return to his or her country because of persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or circumstances under which a reasonable person would fear persecution. *See Matter of Mocharrabi*, 19 I&N Dec. 439 (BIA 1987). An alien who is seeking withholding of removal from the United States must show that the alien's life or freedom would be threat-

ened in such country on account of race, religion, nationality, membership in a particular social group, or a particular political opinion. See Section 243(h)(1) of the Act. *Also see INS* v. *Stevic*, 467 U.S. 407, 413 (1984). An alien seeking relief under the Convention Against Torture must show clear probability standard, that is that it more likely than not that the alien would be tortured if returned to their home country. See 8 C.F.R. 208.18(a).

FACTS

Respondent testified today that she arrived in the United States on November 1st, 2001, with a fraudulent passport. Although she had a passport that she had obtained in China, she did not use that to obtain entry in the United States. She testified and the documents in this case support that she paid a smuggler in her attempt to enter the United States. She testified today that she came to the United States to apply for political asylum because she heard that many Chinese were doing that. When she arrived in the United States and underwent an immigration interview, she told the INS officer that she came to the United States because she wanted to live and work here.

Respondent's mother apparently had an arrangement with a what respondent testified was a go-between in her local village. This go-between was to setup a marriage for respondent. Respondent's mother paid 500 RMB, for this arrangement to the go-between. The go-between found a potential husband for her. The potential husband's name was Chen Zhi. Mr. Zhi, paid 18,800 RMB to the go-between. This 18,800 RMB was given to respondent's mother. Respondent's mother used that

money to pay family bills. Respondent testified that some of the money was used for school bills and other family debts. The respondent testified that in this marriage arrangement there were no written documents. Apparently no contracts. It was just an understanding and arrangement were money was exchanged hands by both parties through the go-between.

Respondent testified that at first Mr. Chen Zhi was a rather acceptable potential husband. She later discovered that he had a bad temperament. He gambled. The respondent tried to persuade him to pay back his debts, but he refused to do so; and the relationship soured. Mr. Chen Zhi threatened respondent when she tried to cancel the arrangement. And one time he slapped her and refused to cancel the engagement. Mr. Chen Zhi attempted to get his money back, but there was no money to pay back because respondent's mother had spent the money on other family's debts.

The respondent testified that in the winter of 2000, she went to work as a cashier in a photo studio. It was about an hour away by boat from her house. At first, Mr. Chen Zhi went to her mother's house looking for her, could not locate her, became angry, smashed things. On one occasion the respondent came home to visit her mother, Mr. Zhi followed respondent back on the boat, learned were she lived, or at least learned the city that she was living in, but didn't go know her exact location. When respondent attempted to end the marriage relationship and Mr. Chen Zhi would not allow it. He came to the mother's house several times. Eventually, on one occasion, he created such a disturbance that the neighbors told him that respondent had left the United States and that respondent would work hard to pay him back

the money. When respondent was unable to terminate the marriage relationship, she and her mother decided that she should come to the United States and somehow the mother was able to arrange a smuggler with a fraudulent passport and respondent arrived in the United States on October 31st, 2001.

CONCLUSIONS OF LAW

I found the respondent to be a credible witness. I believe she has testified truthfully today. However, it is respondent's burden of proof to establish that she is a refugee, that her circumstances fit under the definition of a refuges; that is to say that she was persecuted because of her race, religion, nationality, membership in a particular social group, or political opinion. The respondent has failed to establish that she's a refugee. Her testimony today indicates that there is dispute between the families over this marriage arrangement. When respondent attempted to break the engagement her mother had already spent the money and she was unable to pay back Mr. Chen Zhi, and Mr. Chen Zhi became angry when he lost both his potential bride and his money.

This is clearly a dispute between two families and does not establish that respondent is a refugee. Although respondent's attorney has argued that she has established that she is a refugee because there's no way that she could be protected by the government, the record does not establish that. There was some kind of a contract, although it may not have been a written contract. Mr. Chen Zhi said that he would get his uncle to sue the family. That does not establish that the government would not protect her. Moreover, that's mere

speculation. Apparently, there has been no lawsuit up until this point in time. Respondent has also argued that she's a member of a social group, in his area consisting of females who are in arranged marriages. However, to establish that she is a member of a social group respondent needs to establish that there is some immutable characteristic that she is unable or unwilling to change.

In this particular case, respondent was able to relocate safely to another city. Therefore, I find that she could have relocated to other parts of China. It was not necessary for her to come all the way to the United States to be safe from this man. The other reason that she does not establish that she is a member of a particularly persecuted social group of female is because her mother violated the oral contract that she had with this go-between, and that is what caused the anger by the boyfriend in this situation and not political opinion or a particular social group membership.

THE ORDER

Accordingly, respondent's application for asylum is denied on the grounds that she has not established that she is a refugee.

Respondent's application for withholding of removal is denied.

Respondent's application for protection under the Convention Against Torture is denied, and respondent is ordered removed to the People's Republic of China.

/s/ SARAH M. BURR for Christine Bither
SARAH M. BURR
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL, U.S. COURTHOUSE
46 FOLEY SQUARE
NEW YORK 10807

No. 04-1874-ag

HONG YING GAO, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL, RESPONDENT

[Oct. 19, 2006]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of October two thousand six.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellee Alberto Gonzales. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ ILLEGIBLE
Motion Staff Attorney

APPENDIX E

1. 8 U.S.C. 1101(a)(42) provides in pertinent part:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or

who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

2. 8 U.S.C. 1103(a)(1) (Supp. IV 2004) provides:

§ 1103. Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

3. 8 U.S.C. 1158 (2000 & Supp. IV 2004) provides in pertinent part:

§ 1158. Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

* * * * *

§ 1158(b), as amended by REAL ID ACT of 2005, Pub. L. No. 109-13, § 101(a), 119 Stat. 302 (to be codified at 18 U.S.C. 1158(b))

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV). or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

* * * * *

4. 8 U.S.C. 1231 (2000 & Supp. IV 2004) provides in pertinent part:

§ 1231. Detention and removal of aliens ordered removed

* * * * *

(b) Countries to which aliens may be removed

* * * * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

* * * * *

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(2)

No. 06-1264

Supreme Court, U.S.
FILED
JUN 13 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ALBERTO R. GONZALES,
ATTORNEY GENERAL,

Petitioner,

v.

HONG YING GAO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

CAROLE NEVILLE
Counsel of Record

MICHAEL ROBERT CARNEY
Attorney

SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: 212.768.6700
Facsimile: 212.768.6800

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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QUESTION PRESENTED

Did the court of appeals err in holding, after the resolution of the issue by the immigration judge and summary affirmance by the Board of Immigration Appeals, that women sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable constitute a "particular social group?"

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-18a) is reported at 440 F.3d 62. The order of the Board of Immigration Appeals (BIA) (Pet. App. 19a) summarily affirming the decision of the Immigration Judge (IJ) and the oral decision of the IJ (Pet. App. 20a-26a) are unreported.

JURISDICTION

The Second Circuit entered its judgment on March 3, 2006. A petition for rehearing was denied on October 19, 2006. Pet. App. 27a-28a. The petition for a writ of certiorari (Petition) was filed on March 15, 2007. On April 12, 2007, the time within which the Respondent, Hong Ying Gao, was permitted to file a response to the petition for writ of certiorari was extended to and including June 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

SUMMARY OF THE OPPOSITION TO THE PETITION

In order to convince this Court to review and reverse the Second Circuit decision, the Petitioner manufactures a conflict between the decision of the court of appeals and *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*), and *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006) (*per curiam*). *Ventura* and *Thomas* stand for the principle that remand is ordinarily required by a court of appeals when the

agency has not addressed in the first instance an issue that the asylum statute places primarily in the agency's hands. *Ventura*, 537 U.S. at 16 (remand necessary because the agency had not considered changed circumstances); *Thomas*, 126 S.Ct. at 1615 (remand necessary because the agency considered a claim for asylum based upon social and political views, not based upon membership of a particular social group). In the Respondent's case, by contrast, the Second Circuit reviewed a legal issue – the definition of a particular social group within the meaning of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(42)(A) – that had been presented to and expressly considered by the agency. In addition, the Second Circuit remanded Gao's asylum petition to the BIA for further proceedings consistent with its rulings on this and other asylum requirements to make the ultimate asylum eligibility determination. The Second Circuit's exercise of authority is consistent with the statute governing judicial review (8 U.S.C. 1252), this Court's *Ventura* and *Thomas* decisions, other courts of appeals, and agency precedent. As the decision of the Second Circuit does not conflict with any decision of this Court or any other court of appeals, further review on the ground of a so-called "failure-to-remand" error (Pet. 23) is not warranted.

The central premise of the Petition is that there is some distinction between a non-consensual brokered marriage arrangement condoned by the local authorities, which was how Gao's counsel framed the request for asylum in her appeal to the BIA[1] and to the IJ below, and

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[1] As the Petition acknowledges, Gao argued that she was persecuted on account of her membership in a particular social group composed of "'young women of Fuchow ethnicity, who have not [*sic*] had traditional

(Continued on following page)

"forced marriage," the term used by the Second Circuit. Based on that semantic distinction (not the record taken in its entirety, the legal arguments made by the Respondent to the IJ and BIA, or widely accepted definitions of "forced" versus "arranged" marriages), the Petitioner argues that (i) the formulation of the particular social group adopted by the Second Circuit was neither presented to nor addressed by the agency (*id.* at 2), and (ii) the decision will have the widespread effect of granting refugee status based upon membership in a protected social group to participants in sixty percent of the world's marriages, *id.* at 3-4. The Petitioner's contentions do not stand on their merits upon close examination.

First, the Second Circuit's formulation of Gao's particular social group – "women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable" (Pet. App. 14a) – is soundly based in the administrative record and the arguments of the Respondent's counsel below. Gao's testimony, which the IJ found credible, and the corroborating documents duly admitted into the record compel the conclusion that Gao remains bound to a forced marriage, not a classic arranged marriage. The testimony also established that Gao was sold into marriage to a man found for her family by a go-between for little more than $2000, which sum her family used to pay its debts. The record supports the Second Circuit's conclusion that this

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marriage, arranged by parents and go-between, as practiced by that Fuchow ethnicity, and who oppose the arrangement and who do not have protection against it.' Gao BIA Br. 6-7 (Admin. R. 10-11)." Pet. 9.

arrangement is condoned in rural China. Accordingly, notwithstanding the Respondent's occasional use of the words "arranged" or "arrangement," the record of this case substantiates the Second Circuit's formulation of the arrangement as a "forced" marriage as that term is used by the very sources relied upon by the Petitioner. See 7 Department of State, *Foreign Affairs Manual* § 1459(c) (2005).

Second, the Petitioner's prediction that the decision will open the floodgates to millions of "aliens (women in arranged marriages) entitled to seek asylum" (Pet. 12) has not materialized. The few circuit courts, including the Second Circuit, that have been asked to consider the formulation of a particular social group in the *Gao* decision recognize that the decision rests on the unique facts of the case. The circuit courts continue to require applicants for asylum to prove each requirement for eligibility before the IJ or BIA on a case-by-case basis – before either remanding the matter to the agency for further consideration or denying review of the agency's determination. In sum, there is no pressing need for this Court to review, let alone reverse, the Second Circuit decision based upon an important new issue of law or an alleged effect on immigration law and policy.

As more fully discussed herein, no genuine or intolerable conflict between the Second Circuit decision and this Court's decisions in *Ventura* and *Thomas* or any other ground for granting a writ of certiorari under Supreme

Court Rule 10 exists.[2] Accordingly, the Petition should be denied.

STATEMENT OF FACTS

The undisputed facts are fully set forth in the decision of the Second Circuit. Pet. App. 2a-4a. The facts in the record are reviewed herein solely to address the Petitioner's contention that the Second Circuit "defied the record before the agency" and "framed the social group it identified in terms that had not been argued to, let alone considered by, the agency." Pet. 16.

On January 24, 2003, Gao appeared before the IJ and testified in support of her application.[3] The IJ found Gao to be a credible witness. Pet. App. 24a. Given the full evidentiary weight, the Respondent's testimony should be deemed sufficient to establish the following facts as

[2] As the late Chief Justice Rehnquist noted, "[t]he function of the Supreme Court is * * * to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over the lower federal courts." *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting), *quoting* Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949. None of the circumstances Chief Justice Rehnquist noted above are present here.

[3] Reference is made herein to (i) the January 24, 2003 hearing, which appears in the administrative record on pages 48-83; (ii) Gao's brief on appeal to the BIA, which appears in the administrative record on pages 5-17; and (iii) a letter to the IJ from Gao's mother, which appears in the administrative record on pages 104-105. These documents are attached hereto as Appendices A, B, and C, respectively, and are referred to herein as "App."

corroborated by supporting documents that were duly admitted into evidence without objection.

1. Respondent Was Sold Into A Forced Marriage.

In her testimony, Gao clearly and unequivocally framed her request for asylum as a woman who was being forced into marriage. In response to the IJ's first direct question regarding the basis for her asylum petition, "Why do you want to apply for political asylum?," Gao replied: "Because I was forced by the other people to get married. And then the other people wanted to sue me. So I came to the United States." App., *infra*, 13a.

The record in the *Gao* case compels the conclusion that Gao remains bound to a coerced, non-consensual marriage or forced marriage, and not merely an arranged marriage. The administrative record shows that the marriage agreement was entered into without Gao's consent from the beginning, *id.* at 14a ("At first I did not like too much about the engagement. But after being berated by my family members I stated [*sic*] to get along with the person"). Then, when the man to whom Gao was sold gambled and beat her because she refused to give him money, she opposed the marriage, *id.* at 15a ("I didn't want to marry this person"). See also *ibid.* ("And so I really didn't want the relationship to continue. I didn't want to marry."); *id.* at 16a ("So, he spoke to my family members and forced me to marry him."); *id.* at 17a (" . . . I really didn't want to marry him").

Once the agreement was reached between Gao's family and Chen Zhi (Zhi), the man who was introduced to the family by a go-between, Zhi paid Gao's family 18,880 RMB (approximately $2,250) for the right to marry Gao on

her twenty-first birthday. Pet. App. 22a. Gao's mother paid the broker 500 RMB for his services. *Ibid.*

2. The Practice Is Condoned In Rural China.

Gao testified that Zhi was introduced to her family members by a go-between, who went everywhere in the rural area "to match boys and girls." App., *infra*, 21a.

The record includes the 2001 State Department Country Reports on Human Rights Practices in China which, as the Second Circuit noted, indicated that there was "widespread domestic violence and trafficking in brides and prostitutes" (Pet. App. 3a-4a), fueled by gender imbalance, more prevalent in rural areas, and efforts to change the practice are actively resisted by village authorities. Pet. App. 4a; Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *China-Country Reports on Human Rights Practices-2001* (Mar. 4, 2002).

In addition, in Gao's brief on appeal to the BIA, Respondent referred to the fact that the government does not interfere with this kind of traditional arrangement. App., *infra*, 41a.

3. The Chinese Government Would Not Protect Gao.

When Gao was asked whether she ever went to the police or authorities to ask for help, she answered simply "I did not because I dare not." App., *infra*, 25a. Gao's belief that she would not be protected by the Chinese government was based partly on the fact that the government does not interfere with this kind of arrangement (*id.* at

41a) and partly on the fact that Zhi's paternal uncle was a prominent figure and an official in the local government.

Zhi threatened that if the Respondent refused to marry him, his uncle, a powerful local official, would sue her family. *Id.* at 17a; 22a-23a. The corroborating letter to the IJ from Gao's mother stated that Zhi threatened that he would use his powerful and rich uncle, who was an official in the government, to arrest her daughter. *Id.* at 46a-47a.

The questioning of Gao at the January 24, 2003 hearing and the IJ's resulting oral decision reflect an improper personal or cultural predisposition on the part of both the IJ and counsel for the agency.[4] Counsel for the

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[4] Notwithstanding the agency's substantial expertise in certain immigration matters, a number of courts have vacated factual findings and legal conclusions influenced by impermissible factors like cultural bias, personal beliefs and ideas or unfamiliarity with the applicant's country's legal, political, religious or social system. See, *e.g.*, *Jiang v. Gonzales*, 2007 WL 1394551, at *2-3 (7th Cir. May 14, 2007) (overturning IJ's adverse credibility determination where IJ impermissibly relied on "personal beliefs" and "perceived common knowledge" in concluding that refugee's alleged "rudimentary" knowledge of Christianity denoted refugee was not a true believer); *Kantoni v. Gonzales*, 461 F.3d 894, 897 (7th Cir. 2006) (vacating decision of IJ where IJ found otherwise credible asylum seeker's claims without merit based upon IJ's uninformed beliefs about political culture in asylum seeker's home country: "[i]f immigration judges want to base their findings on insights into the political or military or social culture of the asylum seeker's country . . . they must indicate a knowledge of the culture."); *Zhang v. Bureau of Citizenship & Immigration Servs.*, 201 Fed. Appx. 60, 64 (2d Cir. 2006) (finding IJ's findings of fact erroneous where IJ dismissed petitioners' explanation regarding apparently conflicting documentation simply because such explanation conflicted with IJ's personal experience); *Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005) (vacating IJ's decision as "unreasoned," noting "[a] lack of familiarity with relevant foreign cultures" is a "disturbing feature" that "bulk large in the immigration cases that we are seeing"); *Yi-Tu Lian v. Ashcroft*, 379 F.3d 457, 459

(Continued on following page)

agency, for example, referred to Zhi no fewer than ten times as Gao's "boyfriend" until he corrected himself and asked for the name of the man that Gao's mother arranged for her to marry. App., *infra*, 28a. Notwithstanding counsel's correction, the IJ continued to refer to Zhi as Gao's "boyfriend" in her decision. Pet. App. 25a. The agency representative also sought documentary evidence of the arrangement – the marriage agreement and the transfer of money, although it was clear from Respondent's answers that such documentation would not and does not exist in that region. App., *infra*, 21a. Finally, both the IJ and the agency described the facts of the terms familiar in the United States as a legal dispute over a broken contract or financial arrangement. See Pet. App. 25a; App., *infra*, 37a ("[Gao's] main concern in her testimony was that the family was going to sue because of the financial arrangement, which is a civil remedy open to the family because they didn't follow through with this arrangement."). In sum, the agency's views on the relationships of the parties, the nature of the arrangement, and remedies available

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(7th Cir. 2004) (rebuking immigration judge for making erroneous and conclusory pronouncements of Chinese law where immigration judge demonstrated obvious lack of knowledge thereof, noting that "[o]ur immigration judges are, or at least ought to be, knowledgeable about foreign countries – at the very least they should know how to find the answers to elementary questions of foreign law."); *Barapind v. Rogers*, 1997 WL 267881, at *3 (9th Cir. May 15, 1997) (finding that inferences based on nothing other than IJ's own cultural biases constituted a "string of zeros" and was unsupported by substantial evidence). *See also Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1496 (C.D. Cal. 1988) (permanently enjoining certain INS policies, finding that "[t]he impressions of INS agents and officials that Salvadorans come to the United States solely for economic gain reflect a lack of sensitivity and understanding and derive from ignorance on the part of INS agents as to the complex motivations and situations of those who have fled El Salvador.").

explain the conversion of the history of a young woman in rural China, sold into an abusive forced marriage, into a garden variety dispute over money between two families.

ARGUMENT

1. The Second Circuit Decision Is A Valid Exercise Of The Circuit Courts' Statutory Mandate.

Congress authorized direct review of questions of law in final agency determinations by the circuit courts. 8 U.S.C. 1252. The standard of review universally applied by the circuit courts with respect to legal conclusions, application of law to the facts and mixed questions of law and fact by the agency is *de novo* review. On review, in the proper exercise of judicial authority the circuit court may vacate the agency finding, provide the correct formulation of the legal principle or standard, and then remand to the BIA for further proceedings consistent with the decision. See, *e.g.*, *Himanje v. Gonzales*, 184 Fed. Appx. 105, 107 (2d Cir. 2006) (vacating the BIA's finding as erroneous that credible petitioner could not, as a matter of law, establish membership in "a particular social group," and remanding to the BIA for further proceedings consistent with order); *Niftaliev v. U.S. Attorney General*, ___ F.3d ___, 2007 WL 1514175, at *4-5 (11th Cir. May 25, 2007) (reversing the erroneous ruling of the BIA on the issue of past persecution, affording the petitioner the benefit of the rebuttable presumption described in 8 C.F.R. § 208.16, and remanding to the BIA for proceedings consistent with the opinion); *Gonzalez-Maldonado v. Gonzales*, ___ F.3d ___, 2007 WL 1518661, at *4 (5th Cir. May 25, 2007) (vacating determination that misstatements about residing in California running afoul of 8 U.S.C. 1101(f)(6) and remanding for

further consideration); *Boer-Sedano v. Gonzales*, 418 F.3d 1082 *passim* (9th Cir. 2005) (vacating the IJ's finding that petitioner's harm was not linked to his political opinion). The Second Circuit's review in the *Gao* case is consistent with the court's statutory authority and the circuit courts in scope of review and substantative law. The IJ's legal conclusion, summarily affirmed by the BIA, that Respondent failed to qualify as a member of the particular social group identified by the Respondent was properly the subject of judicial review by the Second Circuit in accordance with the standard practices and procedures followed by federal courts of appeals.

The Petitioner argues, however, that the Court of Appeals committed what it calls the "failure-to-remand" error (Pet. 23) based upon this Court's decisions *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*), and *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006) (*per curiam*). To fit the Second Circuit's decision into the holdings of *Ventura* and *Thomas* as a case where the circuit court decided an issue in the first instance, Petitioner claims that the IJ presented only the question of whether Gao was a member of a social group of women in "arranged" marriages, not a social group of Chinese women who have been sold into "forced" marriages. The entire argument rests on an artificial, purely semantic distinction between a non-consensual arranged marriage condoned by the local authorities, as Respondent's counsel framed the request for asylum in her appeal to the BIA and to the IJ below, and the term "forced" marriage adopted by the Second Circuit.

Petitioner cites a State Department publication to support its distinction between arranged and forced

marriages. But the definitions used by the State Department applied to the administrative record in this case actually demonstrate that Gao considered and described herself to the IJ as a victim of a forced marriage. The State Department in its *Foreign Affairs Manual* (Pet. 20) defines "arranged marriage" as one in which "the families of both spouses take a leading role in arranging the marriage but the choice whether to accept the arrangement remains with the individuals." 7 Department of State, *Foreign Affairs Manual* § 1459(b) (2005). In contrast, the State Department defines "forced marriage" as one in which "at least one party does not consent or is unable to give informed consent to the marriage, and some element of duress is generally present." *Id.* at § 1459(c).[5] These widely adopted definitions rebut the Petitioner's position here that the issue of whether (i) Gao fell into a particular social group was neither squarely presented to the IJ nor considered by it, and (ii) the impending marriage in the *Gao* case was a classic arranged marriage as opposed to the forced marriage recognized by the Second Circuit.

In sum, the Petition does not present a significant legal question or error warranting review by this Court.

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[5] The other source cited by the Petitioner focuses on the distinction between marriages arranged for the sole purpose of establishing asylum and forced marriages, not the difference between traditional arranged marriage and forced marriage. See Ratna Kapur, *Travel Plans: Border Crossings and the Rights of Transnational Migrants*, 18 Harv. Hum. Rts. J. 107, 123 (2005).

2. Petitioner Overstates The Scope And Import Of The Decision In This Case.

The Petitioner's contention that the Second Circuit decision must be reversed because of its far reaching implications (Pet. 3) also depends on the incorrect assumption that the Second Circuit was considering a classic arranged marriage, not a forced marriage. As a result, the Petitioner's prediction of the effect is a gross overstatement of both the scope and import of the *Gao* decision.

First, the definition itself – "women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable" – does not by its terms apply to arranged marriages throughout the world as the Petitioner implies.[6] Second, the Second Circuit itself expressly limited the scope of its definition of "particular social group" as follows:

> We note, additionally, that our definition of Gao's social group is tailored to the facts of this case

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[6] The Second Circuit's formulation of the particular social group is in line with the formulation by the BIA of those groups it has determined to be cognizable as particular social groups within the meaning of the INA. See, *e.g.*, *In re V-T-S*, 21 I. & N. Dec. 792, 798 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry); *In re Kasingu*, 21 I. & N. Dec. 357, 365 (BIA 1996) (young women of the Tchamba-Kunsuntu tribe of northern Togo who have not been subjected to female genital mutilation, and who oppose the practice); *In re H*, 21 I. & N. Dec. 337, 343 (BIA 1996) (Marchan subclan of Somalis); *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (homosexuals in Cuba); *In re Fuentes*, 19 I. & N. Dec. 658 (BIA 1988) (former member of the national police of El Salvador). The refugee in each group has common immutable or fundamental characteristics – gender, kinship, sexual preference, or past experience, which is shared with the members of the group and recognizable within a defined community.

> and does not reflect any outer limit of cognizable social groups. We do not here reach, for example, whether young, unmarried women in rural China comprise a "particular social group" under asylum law such that, if they have a well founded fear of being forced into marriage, they are eligible for asylum.

Pet. App. 14a n.6.

Third, Petitioner's policy argument depends upon the assumption that the particular social group determination is the only legal and factual issue standing between applicants and asylum status. However, applicants must also establish that they (i) have been, or face a well-founded fear of (ii) being subjected to harm amounting to persecution (iii) "on account of" one or more of the five statutory grounds. These additional requirements (which encompass numerous subsidiary issues) in each specific application serve to restrict asylum eligibility to a narrow subset of all individuals who can claim they are described by or fall within a protected group. *Li Juan Wang v. United States AG*, 2007 WL 870376, at *3 (2d Cir. March 22, 2007) ("An asylum applicant must show not only that she was a member of a particular social group or that her case falls within one of the other enumerated protected grounds; the 'applicant must also show, through direct or circumstantial evidence, that the persecutor's motive to persecute arises from' the protected ground.") (citations omitted); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (although Iranian women who find restrictive laws against women so abhorrent they refuse to conform may constitute a cognizable social group under asylum law, applicant must satisfy three elements in order to qualify for withholding of deportation or asylum including the identity of

the group, membership in the group and persecution or a well-founded fear of persecution based on that membership); see also *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (BIA 1990) (holding that recognizing a protected social group of homosexuals in Cuba was not tantamount to awarding relief to all members of that group because each individual must satisfy additional elements of the asylum statute). In the *Gao* case, as in the cases cited above, the Second Circuit remanded multiple dispositive issues for consideration to the BIA, each of which must be resolved in Gao's favor in order for her to be granted asylum or withholding of removal.

Fourth, both the Second Circuit and other circuit courts have denied review of asylum petitions based on membership in the particular social group defined in the *Gao* case for a variety of reasons including the facts of each such case, credibility issues, and asylum considerations other than membership in the particular social group. *Chen v. Gonzales*, 2007 WL 956915, at *2 (7th Cir. March 29, 2007) ("Chen cannot belong to the social group defined in *Gao*, which explicitly limited its social-group definition to the facts of the case, because she was not sold into marriage. But even if we were to assume the existence of a social group of the sort that Chen proposes, and if we were further to assume that Chen belongs to such a group, she would still be ineligible for asylum because she cannot show a well-founded fear that she will be singled out for persecution on that basis in the future"); *Chen v. U.S. Dep't of Justice*, 2007 WL 631748, at *1 (2d Cir. February 26, 2007) (court need not consider petitioner's claim that he would endure hardships as a result of his refusal to enter into an arranged marriage with a village cadre's daughter, which could have been considered one of persecution based on membership in a particular social group based upon *Gao*, because IJ's adverse credibility

finding relating to this issue was supported by substantial evidence); *Hua Lin v. Gonzales*, 205 Fed. Appx. 879, 879 (2d Cir. 2006) (alien's claim that she was sold into a forced marriage was administratively unexhausted and waived).

Finally, Petitioner's suggestion that size of category of potentially eligible members should warrant denial of asylum applications has been rejected by the agency charged with administering the statute. The INS directly addressed the concern that particular social groups would encompass numerically large categories of individuals. A December 9, 1993, legal opinion of the Office of the INS General Counsel provided that:

> The fact that clans may be large, that almost all members of Somali society can claim some clan membership, and that inter-clan conflict is prevalent in Somalia, should not create undue concern that virtually all Somalis would qualify for refugee status. Any applicant for refugee status claiming membership in a particular social group must establish he or she has been persecuted, or may be persecuted, on account of that membership. Thus, while a Somali clan appears to meet the definitional criteria for a particular social group, this is merely the beginning of the inquiry into whether an individual applicant can establish refugee status.

U.S. Dep't of Justice, Immigration and Naturalization Service, Office of the General Counsel, Op. No. 93-91 (Dec. 9, 1993), *available at* 1993 WL 1504038. See also United Nations High Commissioner for Refugees, *Guidelines on International Protection: "Membership of a particular social group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶ 18, U.N. Doc. HCR/GIP/02/02 (May 7, 2002):

> The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2). This is true as well for cases arising under the other Convention grounds. For example, States may seek to suppress religious or political ideologies that are widely shared among members of a particular society – perhaps even by a majority of the population; the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.

In sum, there is no pressing need for this Court to review, let alone reverse, the Second Circuit decision based upon an alleged far-reaching effect on immigration law and policy.

CONCLUSION

Based upon the above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CAROLE NEVILLE
Counsel of Record

MICHAEL ROBERT CARNEY
Attorney

SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: 212.768.6700
Facsimile: 212.768.6800

JUNE 13, 2007

APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of — File A. 77 994 017

GAO, HONG YING, Respondent — IN REMOVAL PROCEEDINGS — Transcript of Hearing

Before CHRISTINE BITHER, Immigration Judge

Date: January 29, 2003 Place: New York, New York

Transcribed by DEPOSITION SERVICES, INC. at Rockville, Maryland

Official Interpreter: David Leung

Language: Mandarin

Appearances:

For the Immigration and Naturalization Service:	For the Respondent:
Richard Van Veldhuisen, Esquire	Morry Cheng, Esquire

* * *

[7] JUDGE FOR THE RECORD

Good morning. This is Immigration Judge Christine Bither appearing in New York City on January 24th, 2003, in the matter of Fengling Liu, A 77 994 017.

JUDGE TO MS. CHENG

Q. Counsel, do you –

A. In the matter of Gao Hong Ying.

JUDGE FOR THE RECORD

One moment please while we go off the record.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

Back on the record. I was simply looking at an incorrect order. This is the case of Hong Ying Gao, G-A-O, A 77 994 017.

JUDGE TO MS. CHENG

Q. Counsel, would you state your names for the record please.

A. Morry Cheng for the office of Fengling Liu.

Q. And would you spell your name for the record please?

A. M-O-R-R-Y C-H-E-N-G.

Q. Thank you.

MR. VAN VELDHUISEN TO JUDGE

Q. For the Government, Richard Van Veldhuisen, [8] Assistant District Counsel. That's spelled V-A-N V-E-L-D-H-U-I-S-E-N.

A. Thank you.

JUDGE TO MS. CHENG

Q. And, Ms. Gao's best language is what language please?

A. Mandarin.

Q. All right.

JUDGE FOR THE RECORD

We have present in Court today a Mandarin interpreter.

JUDGE TO INTERPRETER

Q. Would you state your name for the record please?

A. David Leung, L-E-U-N-G, Mandarin interpreter.

Q. We would like to swear the interpreter at this time please. Do you swear that you will interpret to the best of your knowledge English into Mandarin and Mandarin into English?

A. Yes, I do.

Q. Thank you. Please be seated. Could we just have the respondent state her name for the record please through the interpreter?

MS. GAO TO JUDGE

Q. My name is Gao Hong Ying.

A. And who is the person seated next to you in the yellow jacket?

Q. That's my defensive lawyer.

[9] A. Do you give her the authority to speak for you today when necessary?

Q. Yes.

A. Have you reviewed your asylum application with your attorney?

Q. I did that.

JUDGE TO COUNSEL

Q. All right, counsel, for the record we're going to go over the Exhibits and enter those that haven't been entered yet.

MS. CHENG TO JUDGE

Q. Your Honor, –

A. Is there anything further?

Q. – I would like to make some corrections on the I-589.

A. And why are you making them the day of the hearing?

Q. Because some of the dates are mixed up.

A. But why wasn't that done before the hearing?

Q. That she just pointed out for us yesterday.

A. All right. Could you give it to me, please. Do you have a copy for the Government?

MR. VAN VELDHUISEN TO JUDGE

Q. She served me with a copy, Your Honor.

A. Thank you.

[10] JUDGE TO MS. CHENG

Q. And what dates are we referring to?

Q. Question number did you change? We're talking about her schools, the dates she attended school. Is that correct?

A. That is correct.

Q. And so on this exhibit your handing me you've just changed those dates?

A. Yes.

Q. All right. Thank you.

JUDGE FOR THE RECORD

We'll mark these into the record just to be clear. All right. We've already marked into the record Exhibit 1, which is the Notice to Appear. We've Marked Exhibit 2 as the change of venue in which Ms. Gao admitted and conceded her deportability.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

All right. We're back on the record. We just clarified that the application for asylum has not been marked as an exhibit. We will mark that as Exhibit 3. And we will mark the one page that was submitted in the Court today, application for asylum, withholding, where the question number 27, the school dates, was corrected as Exhibit 3A. All right. We need to swear the respondent to the truthfulness of this asylum application.

[11] JUDGE TO MS. GAO

Q. Please stand and raise your right hand. Do you swear that the contents of this application are true and correct to the best of your knowledge?

A. Yes.

Q. All right. Now let me remind you that you need to speak up so the tape recorder can pick up your answers. If you nod your head that's not a clear answer. We need to hear a yes or no. Do you understand?

A. Yes.

Q. Is there any reason that you cannot testify truthfully today?

A. Nothing.

Q. You're not on any medications?

A. No.

Q. Now after you filled out this asylum application and you reviewed it with your attorney, did your attorney read your statement to you?

A. Yes.

Q. All right.

JUDGE FOR THE RECORD

Now we have some other exhibits here.

MR. VAN VELDHUISEN TO JUDGE

Q. Your Honor, can I just inquire as to the I-589? Did she actually sign on the original part, did she just sign [12] that?

A. On the application?

Q. Yes. On page eight.

A. On the application I have she did sign the original.

Q. Okay. That's all right. I just wanted, on the very bottom?

A. To be completed at the interview, has not been signed. We should sign that today.

Q. I would just ask that she sign it in front of the Court today.

A. All right.

JUDGE TO MS. GAO

Q. Ms. Gao, we're going to have you sign your signature today on the back of this asylum application. By your signature, you're indicating that everything in that application is true.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE TO MS. CHENG

Q. Thank you, counsel.

JUDGE FOR THE RECORD

We have attached to the original asylum application the original packet here, a letter from Ms. Gao's mother. It's not dated, but it says respectful honorable Judge.

[13] JUDGE TO COUNSEL

Q. Counsel, do you both have a copy of that?

A. (Morry Cheng) Yes.

A. (Mr. Van Veldhuisen) Yes, the Service does, yes.

JUDGE FOR THE RECORD

We're going to mark that as Exhibit 4.

JUDGE TO MR. VAN VELDHUISEN

Q. Are there any objections from the Government?

A. Just as to weight, inability to cross-examine the author of the letter.

JUDGE FOR THE RECORD

Objection noted. That will be marked into evidence as Exhibit 4. We also have attached to that Packet, the U.S. Department of State Country Report for China. We'll mark that as Exhibit 5.

JUDGE TO MR. VAN VELDHUISEN

Q. Are there any objections from the Government?

A. No.

JUDGE TO MS. CHENG

Q. Does counsel for the respondent have any further exhibits?

A. No, Your Honor.

JUDGE FOR THE RECORD

Now the Government has also submitted some exhibits in this case. From the Government we have the record of sworn [14] statement that was taken at the airport, signed by Ms. Gao, and dated November 1st, 2001. I'm going to enter that into evidence as Exhibit 6.

JUDGE TO MS. CHENG

Q. Is there any objection from counsel?

A. No, Your Honor.

JUDGE FOR THE RECORD

And we also have Ms. Gao's passport.

JUDGE TO COUNSEL

Q. Any objection form counsel on the passport? From either side?

JUDGE TO MS. CHENG

Q. Well, submitted by the Government so it would be. Counsel for the respondent, do you have any objections?

A. No, Your Honor.

Q. And you have a copy of that?

A. Yes.

Q. All right.

JUDGE FOR THE RECORD

We'll mark that as Exhibit 6.

JUDGE TO COUNSEL

Q. Anything further from either side?

A. (Morry Cheng) No, Your Honor.

A. (Mr. Van Veldhuisen) The only thing, that I did receive from counsel and I don't know if this was part of your [15] Exhibit 3, was a notarial birth certificate of the respondent and her household registration. Did you make that part of Exhibit 3?

JUDGE TO MR. VAN VELDHUISEN

Q. It was my intention to make that part of Exhibit 3. That's like a packet that came in.

A. That's fine. I just wanted to clarify, thank you.

Q. Thank you for clarifying that.

A. No objection to those.

JUDGE FOR THE RECORD

Exhibit 3 also includes these documents.

JUDGE TO MS. CHENG

Q. Are we ready to proceed?

A. Yes.

Q. All right.

JUDGE TO MS. GAO

Q. Ms. Gao, what is your best language?

A. Chinese.

Q. And what dialect of Chinese do you understand?

A. Mandarin.

Q. Have you been able to understand what the interpreter is asking you?

A. I understand.

JUDGE TO INTERPRETER

Q. And Mr. Interpreter, have you been able to understand Ms. Gao?

[16] A. I understand.

Q. Okay, I just want to make sure we have the correct interpreter.

JUDGE TO MS. CHENG

Q. All right, counsel, you may proceed.

MS. CHENG TO MS. GAO

Q. What's your birth date?

A. 1980 December 8th.

Q. Are you married?

A. No.

Q. Do you have children?

A. No.

Q. When did you last leave your country?

A. It was in 2001, October.

Q. Do you remember what date?

A. The 27th.

Q. How did you leave your country, by what transportation means?

A. By plane.

Q. When you left your country at airport did you present any passport to government?

A. No.

Q. Did you, how did you get your boarding pass?

A. Someone else obtained on my behalf and then took me inside.

[17] Q. Do you know what the document or passport they, they showed to the government in order to obtain the boarding pass?

A. I don't know. He just gave me the boarding pass.

Q. When did you last enter the United States?

A. 2001 November 1st.

Q. When you entered United States did you present any passport to the U.S. government?

A. I did.

Q. Was that your own passport?

A. No my own passport.

Q. Was your photo in the passport?

A. Yes.

Q. Was your name in the passport?

A. No.

Q. How did you get that passport?

A. Someone else gave it to me.

Q. Why did you come to the United States?

A. I want to come to the United States to apply for political asylum.

Q. Why do you want to apply for political asylum?

A. Because I was forced by the other people to get married. And then the other people wanted to sue me. So I came to the United States.

Q. Would you tell us about what happened. Who wants [18] to force you for marriage?

A. It was a person introduced by a go-between to my family members previously and later I did not want to marry the person and so the person forced me to.

Q. Did that happen?

A. At the time when we engaged it was year 2000. And then in year 2001, when I was about to reach 21 of age, then this incident happened. I was forced to marry.

Q. When were you engaged? Could you tell us the background of the engagement?

A. Yes. It was around year 2000. A go-between refer an individual to my family members and when this go-between introduced this individual to my family member, my mother was satisfied with that person. And so she agreed to it.

Q. And then what happened after she agreed to it?

A. And then they chose a date for the engagement and they received some money for that engagement. By doing so we were considered engaged.

Q. And when was that?

A. It was around year 2000 in July.

Q. Do you remember the date?

A. Because at the time I was not at home and when they received the gifts money I'm not too sure about that, when.

Q. Do you know how much the gift?

A. 18,800.

[19] Q. RMB?

A. Correct.

Q. So, what happened after you were engaged?

A. At first I did not like too much about this engagement. But after being berated by my family members I stated to get along with this person. At first I felt his personality was rather acceptable. And he showed somewhat respect to be. However, after some of the more further understanding the personality, I didn't think he was such a nice person.

Q. So what happened after that?

A. And then I felt that his temperament become very bad and he cursed all the time and he stopped working, and he hang around outside with friends, and he gambled, and he owed people a lot of money.

Q. So, did you do anything about it?

A. Yes, when he changed into that kind of person, I tried to persuade him to look for another job and to pay back the money bit by bit. But he wouldn't listen to me, but he asked me for more money, I didn't have the money so he started to yell at .me and even beat me up.

Q. Then what happened after that?

A. And eventually I didn't want the relationship to develop any further, And I suggested that to cancel the engagement. I didn't want to marry this person. Then he even [20] become worse. He threatened me. He didn't want me to say anything about him. And he asked me for more money. I didn't have the money. So he started to ask money from my family members.

Q. And then what happened after that?

A. And then I did not have the money. He said that since my parents (indiscernible) to get money from him, they should have the money, but when my mother promise him to marry me to him, my mother tried to get the money, to pay back our debt. And so our family didn't really have money and I didn't have the money to give him. So, we had argument all the time. And so I really don't want the relationship to continue. I didn't want to marry.

Q. So, did you take any actions?

A. And so he wouldn't agree to the cancellation of the engagement. And in order to avoid him, I went away to another place to work. I didn't want to see him no more.

Q. What place did you go?

A. I went to work as a cashier at the photo studio at Fuchou, F-U C-H-O-U. M-A-W-E-I District.

Q. And how far is that place from your home?

A. It's about an hour.

Q. By what?

A. By boat.

Q. So, anything happen after you worked there?

[21] A. And then he went to my home several times. He didn't find me. He asked my parents, where did I go. My parents said, they didn't know. He became very angry. He smashed some something an my home and then he left.

Q. And what happened after that?

A. And then in 2001, at that time, because my birthday fell on December and I have to reach 21st in order to get married. So, he spoke to my family members and forced me to marry him by that time.

Q. When you say you have to reach 21st, 21st what? You mean, what, the date, or the year, the age? 21st.

A. (Interpreter) I believe 21st years of age.

JUDGE TO INTERPRETER

Q. Excuse me, interpreter, you have to ask the question as stated by counsel to the witnesses.

A. Your Honor, –

Q. She can clarify that.

A. Okay.

Q. Thank you.

MS. GAO TO MS. CHENG

Q. Twenty one years of age.

A. Thank you. So, what happened after that?

Q. And then I did not go home I'd knew it from my parents. But when he did not find me, he continued to visit my home and to make troubles with my family members, as my mother [22] told me.

A. So, then anything else happened after that?

Q. So, after a period of time something came, I spoke to my mother and I told her that I really didn't want to marry him, and so why don't you arrange for me to leave China.

A. So, then anything else, what happened after that?

Q. And then my mother agreed for me to leave the country upon advise from my paternal aunt. After I left, he came to my home with some other people and said time is almost up. He wanted to see me in person. But my family members said that I was gone. I was gone. I left for a place far away and I would not come back. And later he asked my family members again that if they failed to present me he would summon his paternal uncle to sue my family. Because my family took his money at the time of the engagement and he could sue my family as cheating him for the money. And then I ran away after I took the money.

A. And then what happened after he threatened that?

Q. (Interpreter) After?

A. What happened after –

MR. VAN VELDHUISEN TO INTERPRETER

Q. Just, just for clarification –

A. Excuse me.

Q. Sorry.

Q. Just to clarify something with the interpreter. Did she say that she ran away, she took the money and ran away?

[23] Is that what the interpreter said? I just need to clarify –

MS. GAO TO MR. VAN VELDHUISEN

Q. Because my mother took the money and the money was already returned to someone else and I didn't have the money.

A. Thank you.

MS. CHENG TO MR. VAN VELDHUISEN

Q. Was that what you want?

JUDGE TO MS. CHENG

Q. Excuse me. If you have some comments would you please address them to the Court. You may continue.

A. Sure.

MS. CHENG TO MS. GAO

Q. So, what happened after that?

A. And after that he wouldn't believe I already came to United States and he took a big group of people to create more troubles in my home.

Q. And then what happened?

A. And then he created a big scene to the extent that the neighbors came out to tell him that I already came to United States and would work hard to pay him back the money and I was no longer in China.

Q. After you came to the United States, did you contact your family?

A. Yes.

Q. Whom did you contact?

[24] A. With my mother.

Q. And what did you hear from your mother?

A. My mother said he continued to come but since he couldn't find the person. So, my mother could only try her best to pay him back the money.

Q. And anything else you heard from your mother?

A. For my mother because after he create all this troubles in order to not run into him to often. So, my mother move her residence from time to time.

Q. Did you ever ask your mother to, to give, to give a statement regarding to what happened to you?

A. No, only when we correspond, I told my mother and she mentioned symbol in her message. Sometimes she relies on some other people to send the message.

Q. Why didn't you just relocate to somewhere else in China?

A. Because at that time, many people came to the United States. I thought about going to some other places. But what I heard and saw people coming to the United States and eventually I wanted to come to the United States. And I heard the other people say you could apply for political asylum here.

Q. Do you remember that you were interviewed at airport? Do you remember you were interviewed at airport?

A. What airport? Do you mean in China or where?

Q. In the United States.

[25] A. Yes, at the airport?

Q. On November 1st, 2001?

A. 2001 November 1st at the airport.

Q. Do you remember that you were interviewed on that date?

A. Yes.

Q. Do you remember that you were asked what's the purpose of your visit to the United States?

A. Correct.

Q. Do you remember that you answered, to work and to live?

A. Correct.

Q. And today you told us that you came to United States to apply for political asylum. And how do you reconcile the, the difference?

A. Because at the time when they asked me What did I do when I come to the United States. My understanding was that they were asking what kind of work I'm prepared to do in United States.

MS. CHENG TO JUDGE

Q. I have no more questions.

JUDGE TO MR. VAN VELDHUISEN

Q. Does the Government have any cross?

A. Yes, Your Honor.

MR. VAN VELDHUISEN TO MS. GAO

[26] Q. This arrangement that you had with this matchmaker agency, was it a formal written arrangement?

A. Are you asking whether it involves documents?

Q. Yes.

A. Nothing.

Q. Did you know the go-between person? Did you personally know that person?

A. The Person is just a go-between person, a private individuals in the rural area and the person pays visits everywhere to match boys and girls.

Q. Did you ever meet this person?

A. The go-between, yes.

Q. And was there any, any type of receipt for the money that was exchanged?

A. No. In our area, nothing like that.

Q. Well, what happened to the money that your parents received for this arrangement?

A. The money was paid back to other people.

Q. When you say other people, who are you talking about?

A. It was like previously when we went to school, we did not have enough money to pay. We borrow money from the other people. Or when we were sick, we didn't have the money to see a doctor, and we borrowed money from the other people.

Q. So, your saying you used this money to pay bills, [27] family bills?

A. Correct.

Q. Now in your mother's letter, just for the record Exhibit 4, you said that she promised to return the money to your boyfriend, Did she ever return the money?

A. Up till now, no,

Q. Did she pay any money back to him?

A. Up till now, they have not paid him back because they didn't have enough money and because I sent only a little money back to them and only enough for them to have, make a living.

Q. Now did your parents give you any money to travel to the United States?

A. Yes.

Q. And how much did it cost you to travel to the United States?

A. I'm not, I don't know about that. My mother never want to mention that to me.

Q. But do you know how much it cost? Well, you said that your mother gave you some money to travel to the United States. How much money?

A. Its about 1,000 RMB.

Q. Now, you told us that your boyfriend threatened his family threatened to sue you. Did they ever sue your family?

A. I'm not to sure about that because his paternal [28] uncle did business outside and he knew relatively more government officials and I heard that on one occasion he took with him some people and make arrests for another individuals. And I was somehow concerned and so I left first.

Q. My question was, did they ever, do you know whether they ever sued your family for the money?

A. I don't think they did. He only threatened me.

Q. Now, when you started, did you ever go back to the go-between or the agency when you were having problems with your boyfriend?

A. Because in the beginning the go-between only help you to arrange for the engagement and after that his job is done and he wouldn't care less.

Q. Well, when your boyfriend started to beat you and threaten you, did you go to the police for help?

JUDGE TO MR. VAN VELDHUISEN

Q. Let me just clarify that. I think you've misstated her testimony, counsel. You said when her boyfriend threatened to beat her. I don't believe that's her testimony.

A. I will clarify that.

Q. Would you please clarify?

A. Sure.

MR. VAN VELDHUISEN TO MS. GAO

Q. Did you testify that your boyfriend yelled at you and would beat you up?

[29] A. Correct.

JUDGE TO MR. VAN VELDHUISEN

Q. He threatened to beat her. He did not beat her, as I understand it. Could we please clarify?

JUDGE TO MS. GAO

Q. Did your boyfriend ever beat you?

A. He did.

Q. He physically touched you?

A. What?

Q. Did your boyfriend touch you with hands in a harmful way?

A. He did. Yes.

Q. What did he do?

A. He slapped me because as we talked he asked me for money, I didn't have the money so he just slapped me.

Q. Thank you.

JUDGE TO MR. VAN VELDHUISEN

Q. You may proceed.

MR. VAN VELDHUISEN TO MS. GAO

Q. Did you ever, when you were having problems with your boyfriend, did you ever go to the police or any authorities to ask for help?

A. I did not because I dare not.

Q. Now, you told us that you, you moved away to work as a cashier to Mawei District, correct?

[30] A. Yes.

Q. And approximately when was that?

A. Its around year 2000 December in the winter time.

Q. Was that first time that you worked as a cashier?

A. Correct.

Q. And did you have any problems when your were in the Mawei District with your boyfriend?

JUDGE TO MR. VAN VELDHUISEN

Q. Excuse me. Would you rephrase that question, please?

MR. VAN VELDHUISEN TO MS. GAO

Q. When you were living in Mawei District, did you have any problems with your boyfriend?

A. In the beginning there was some problems because we had argument and I was angry so I left.

Q. Well, did you, how long did you live in Mawei District?

A. It's about half a year.

Q. And did he know that you were living there?

A. At first he did not.

Q. Did you, did you ever tell him that you were living there?

A. I did not.

Q. Do you know how he found out?

A. Because later when I went home I bumped into him [31] and then he followed me when I left to a ferry pier as I boarded the boat and so he find out.

Q. And what problem did you have with him when you were living in Mawei District?

A. And then he knew I was in Mawei. He did not know exactly where I live in Mawei, but he knew I was in Mawei. He threatened my family members. Told them to tell me stop working and came back.

Q. So, he never actually came to where you were living in Mawei District?

A. Correct.

Q. Now, when you gave your statement to the immigration authorities at the airport, on November 1st of 2001, –

A. Yes.

Q. – you told the inspector that the agency was the one that got upset and threatened your mother. Why did you tell them that?

MR. VAN VELDHUISEN TO JUDGE

Q. And for the record I'm just referring to Exhibit 6, page 4.

MS. GAO TO MR. VELDHUISEN

Q. No. I don't recall I did say something like that.

JUDGE TO MR. VAN VELDHUISEN

Q. Counsel, why don't you read the question and [32] answer to her to refresh her memory.

MR. VAN VELDHUISEN TO MS. GAO

Q. Do you recall being asked this question?

JUDGE TO MR. VAN VELDHUISEN

Q. Counsel, why don't you rephrase that? She may not recall.

A. My question is, do you recall being asked this question.

Q. I think she's already –

A. She said she recalls being questioned.

Q. All right. Go ahead. Proceed.

MR. VAN VELDHUISEN TO MS. GAO

Q. The question was, why did you leave your home country.

Q. And your answer was, my mother went into a marriage arrangement a few years ago with an agency in China. Once I got to meet my arranged marriage partner, I did not want to get married to him. I told my mother and she agreed that I should not get married to that man, so she notified the agency. The agency got upset and threatened my mother and me, so my mother decided to get me out of China. Now my question is, why did you tell the immigration inspector that answer?

A. No, because at first when they tried to make the, make the introduction, I had not seen the other person. I was in another place, Mawei, far away and only my mother told me. And [33] so I just make a symbol when I answer those judges and I did not want my mother to get marry, wanted my mother to get me to marry the person. I recall I did not specifically answer that. My mother decided to send me out of country because of that.

Q. Why, in your asylum application and your statement, don't you once mention the name of your fiancé?

A. Because I was not asked and so. I did not say.

MR. VAN VELDHUISEN TO JUDGE

Q. I have nothing further, Your Honor.

JUDGE TO MS. GAO

Q. What is your boyfriend's, I'm sorry. He's not your boyfriend. What was the name of the man that your mother arranged for you to marry?

A. The name is C-H-E-N Z-H-I by phonetics.

Q. Is it true that the agency got upset and threatened your mother when she broke the engagement?

A. I forgot that as to whether my mother told me that I forgot.

Q. So, you don't know whether the agency threatened your mother?

A. I'm not to sure.

Q. All right. Thank you. Did your mother pay money to the agency?

A. Yes.

Q. And how much is that?

[34] A. It's about 500 RMB.

Q. And how much did your mother get from Mr. Chen Zhi for the Marriage?

A. 18,800.

Q. Did you attempt to get a passport in your own name from the Chinese government?

A. Yes.

Q. And what happened when you tried to get the passport?

A. I did not make it in my application. No, no. No, no, I get one based upon my application, but I lost that one. Though I have a photocopy of that passport.

Q. Do you have a photocopy of that passport with you today?

A. I think I did. Let me see.

JUDGE FOR THE RECORD

We'll go off the record while she looks for her passport.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

All right. We're back on the record.

JUDGE TO MS. GAO

Q. Did you find your passport?

A. I couldn't find it now.

[35] Q. You don't have it with you today?

A. Correct.

Q. Do you have at home here in the United States at your home?

A. Because when I obtained my passport based on the application I did make a photocopy of it and my I kept it at home and my mother sent me a copy. But I moved my residence and I could not find the photocopy even though the photocopy was used to be in this envelope.

Q. So, when you said that your passport is at home, do you mean at home in China at your mother's home?

A. No, in United States.

Q. Is your mother here in the United States?

A. No.

Q. Where does your mother live?

A. In China.

Q. Do you have any brothers and sisters?

A. No.

JUDGE TO COUNSEL

Q. Anything further from either side?

A. (Morry Cheng) No, Your Honor.

A. (Mr. Van Veldhuisen) No, Your Honor.

Q. All right. I think we're ready to render a decision.

JUDGE TO MS. CHENG

[36] Q. Counsel, I was going to ask you for some closing arguments, respondent?

A. I'll rest on the record.

Q. And under what theory are You proceeding?

A. I'm sorry?

Q. Under what theory are you claiming that Ms. Gao is eligible for political asylum?

A. Under the political opinion and as well as the social group.

Q. And what political Opinion?

A. Political opinion is that she is not she has no way of protecting, she has no way of being protected by the Chinese government as a result of the circumstance of the, the fiancé and particularly fiancé's uncle who supposed to

have the, the power and the power to put people in jail. And also we claim under the social group that in, in her, in her area that the females marriage being arranged.

Q. All right. Thank you, counsel.

JUDGE TO MR. VAN VELDHUISEN

Q. Government?

A. The Service's position is that she is not eligible for asylum. That the circumstances that she complains of is more of a family problem, family private arrangement that the family made for a marriage. That the mistreatment that she complains of is not, does not rise to the level of persecution, it's not by a [37] government-type of agency, and it's not by a private group that the government is not trying to protect. There's some underlying allegation in her statement that the uncle has some power to arrest her. Although that has not even been, other than that bare statement in her asylum application. Her main concern in her testimony was that the family was going to sue because of this financial arrangement, which is a civil remedy open to the family because they didn't follow through with this arrangement. There has been no evidence that this uncle is in any authority to abuse any type of arrest power that he or, or may not even have. That wasn't developed in this case. Even if the Court was to find that there was some sort of persecution or potential for persecution, there's no nexus here to a social group. The social group potentially being that she's a woman to a harmful marriage arrangement. I would not say that that is a particular social group that is protected under the United States asylum law. And therefore, she fails to meet the definition of refugee. And I ask that the Court deny her application at this time.

Q. Thank you, counsel. All right.

JUDGE FOR THE RECORD

I'm ready to issue a decision.

JUDGE TO INTERPRETER

Q. Mr. Interpreter, could you please take Ms. Gao back and give her a synopsis of what I'm saying so she'll understand?

[38] A. Yes, Your Honor.

Q. Thank you.

JUDGE FOR THE RECORD

And just to be clear, I asked that respondent go up back so that the interpreting does not interfere with the record because I did not want that to be playing over when I'm trying to issue the decision. But the respondent is in the back of the courtroom and will hear my decision.

JUDGE RENDERS ORAL DECISION

JUDGE TO MS. GAO

Q. Ms. Gao, would you please come back to the table, Ms. Gao, the interpreter has been interpreting my decision to you. Do you understand that I have ordered you removed from the United States?

A. Yes.

Q. If you disagree with my decision, you may appeal my decision to the Board of Immigration Appeals. Your Notice of Appeal must be filed with the Board of Immigration Appeals in Falls Church, Virginia. And I'm going to

give you the form today. I'm going to give the form to your attorney as well. This form must be received by the Board within 30 days from today's date. That means that the Board must receive your appeal no later than February 24th, 2003. Do you understand?

A. I understand.

Q. Are you still living at 773 Flatbush Avenue, Third [39] floor, in Brooklyn?

A. No.

JUDGE TO MS. CHENG

Q. Well, counsel –

JUDGE FOR THE RECORD

We should have done this perhaps at the beginning of the hearing, but counsel has served me with a change of address.

JUDGE TO MS. GAO

Q. Is your correct address 3519 88th Street, apartment 1, in Jackson Heights?

A. (No audible response.)

JUDGE TO INTERPRETER.

Q. Mr. Interpreter, do you need to see the address?

A. Oh, sorry.

Q. I'm asking her if her correct address –

MS. GAO TO JUDGE

Q. Yes.

A. And what is your telephone number?

Q. Area code 347, 276 8584.

JUDGE TO MS. CHENG

Q. Counsel, you need to fill that in on this form.

JUDGE TO MS. GAO

Q. And when did you live there?

A. About two months ago.

Q If you move again and you appeal my decision, you [40] must notify the Board of Immigration Appeals of the different address. Do you understand?

A. You mean by mail?

Q. Yes, by mail, I'm going to give you the form today.

A. I understand.

Q. All right. Thank you.

JUDGE TO COUNSEL

Q. Is there any thing further?

A. (Mr. Van Veldhuisen) No, Your Honor.

A. (Morry Cheng) Yes, we reserve the right to appeal.

JUDGE TO MS. CHENG

Q. I'm sorry. Absolutely.

JUDGE FOR THE RECORD

Respondent reserves the right to appeal.

MR. VAN VELDHUISEN TO JUDGE

Q. Final for the Service.

A. All right.

JUDGE FOR THE RECORD

We're going to go off the record for one minute.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

All right. We're back on the record. I am serving a copy of my decision today noting that appeal has been reserved by [41] respondent. And that, that appeal is due no later than February 24th, 2003. And I'm also serving both counsel and Ms. Gao with a packet for, for changing your address and appealing before the Board.

JUDGE TO COUNSEL

Q. Is there any thing further?

A. (Morry Cheng) No, Your Honor.

A. (Mr. Van Veldhuisen) Not from the Service.

Q. All right, Thank you.

JUDGE FOR THE RECORD

End of transcript.

HEARING CLOSED

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

File No. A 77-994-017	)	
In the matter of	)	IN REMOVAL
Gao, Hong Ying	)	PROCEEDINGS
Respondent	)	

APPEAL TO THE BOARD. OF IMMIGRATION
APPEALS FROM THE DECISION OF
THE IMMIGRATION JUDGE

BRIEF ON BEHALF OF
THE APPLICANT-APPELLANT

Respectfully Submitted
Morry Cheng, Esq., Of Counsel
Law Office of Fengling Liu
401 Broadway, Suite 1402
New York, NY 10013
(212) 226-3960

INTRODUCTION

Respondent-Appellant was placed in removal proceedings by United States Government. At hearing on January 24, 2003 in New York City, the Immigration Judge denied the Respondent's application for asylum, withholding of removal and relief under Convention against Torture.

ISSUES PRESENTED

Did the Immigration Judge err in finding that on account of membership in a particular social group the respondent failed to establish that there is some immutable characteristic that she is unable or unwilling to change?

Did the Immigration Judge err in finding that respondent failed to establish that she is a refugee and that the government would not protect her?

STATEMENT OF FACTS

Respondent is a 22 year-old female, a native and citizen of the PRC, who came to the. United States on or about November 1, 2001 and filed an application for asylum and withholding of removal on account of membership in a particular social group.

Around year 2000, a go-between in respondent's local village refers an individual, Chen Zhi, to respondent's family member. Respondent's mother was satisfied with him and allowed the go-between to setup a marriage a traditional way. Her mother and go-between chose a date for the engagement and received some money from that engagement in July 2000. Respondent's mother paid 500 RMB, for this arrangement to the go-between. Mr. Zhi, paid 18,800RMB to the go-between to give to respondent's mother. Respondent's mother used that money to pay bills and other family debts. There was no written contract but only oral agreement in traditional way.

At first respondent did not like too much about this engagement. But after being berated by her family members she started to get along with this person. She later discovered that he had a bad temperament. He gambled.

He cursed all the time and he stopped working. The respondent tried to persuade him to pay back his debts, but he refused to do so; and the relationship soured. Mr. Chen Zhi asked for money from the respondent but she did not have the money. He started to yell at her and even beat her up. Mr. Chen Zhi threatened respondent when she tried to cancel the arrangement. He slapped her and refused to cancel the engagement. Mr. Chen Zhi attempted to get his money back, but the respondent's mother could not pay back because she her had spent the money on other family's debts.

In the winter of 2000, respondent went to work as a cashier in a photo studio in Fuzhou City. It was about an hour away by boat from her house. At first, Mr. Chen Zhi went to her mother's house looking for her but could not locate her. He became angry and smashed things. On one occasion the respondent came home to visit her mother, Mr. Zhi followed respondent back on the boat and learned the city she lived. When respondent attempted to cancel the marriage arrangement, Mr. Chen Zhi would not allow it. He came to her mother's house several times. In 2001, because respondent's birthday fell on December, and Chen Zhi spoke to her family members and forced her to marry him when she reaches to 21 years old. When Chen Zhi did not find respondent, he continued to visit her home and to make troubles with her family member. When respondent was unable to terminate the marriage arrangement, and they knew that they could not get protection from government, partly because government does not interfere with this kind of traditional arrangement of marriage inherited from feudal system, also partly because Chen Zhi's paternal uncle was prominent figure and had some connection with local government. Mr. Zhi's uncle had power of

making government arrest people. Therefore, the respondent and her mother decided that she should flee to the Unites States. After respondent left China, Chen Zhi came to her home with some other people and said time was almost up. He threatened her family to present her or he would ask his paternal uncle to sue her family. Mr. Chen Zhi would not believe that she already came to United States. He brought a group of people to create more troubles in her home. Eventually, on one occasion, he created such a disturbance that the neighbors told him that respondent had left for the United States and that respondent would work hard to pay him back the money. After respondent arrived United States, she learned that Chen Zhi continued to come and her mother hae to move her residence from time to time to avoid Mr. Chen Zhi's harassment.

ARGUMENT

The Immigration Judge erred in finding that on account of membership in a particular group, the Respondent failed to establish that there is some immutable characteristic that she is unable or unwilling to change. Eligibility for asylum based on membership in a particular social group requires the applicant to show that she will be persecuted because of her membership in a group of persons "all of whom share a common immutable characteristic." The characteristic must be one which the members of the group cannot change, or should not be required to change because it is "fundamental to their identities or consciences." *Matter of Acosta* 19 I&M Dec. 211, 233 (BIA 1985), modified on other grounds, *Matter of Mogharrabi,* 19 I&N Dec, 439 (BIA 1987) *See also Matter of H-,* Interim Decision 3276 (BIA1996) (finding that identifiable shared

ties of kinship warrant characterization as social group). In *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) the court provided additional guidance, holding that in order to prevail on a social group membership claim the individual must: I) identify a group that constitutes a particular social group, 2) establish that she is a member of that group, and 3) show that she would be persecuted based on that membership. Fatin v. INS, supra at 1240.

Pursuant to Acosta and Fatin, the respondent claimed that she belongs a membership of a particular social group: Young women of Fuchow ethnicity, who have not had traditional marriage, arranged by parents and go-between, as practiced by that Fuchow ethnicity, and who oppose the arrangement and who do not have protection against it.

In accordance with Acosta, here, the characteristics of being a "young woman" and a "member of the Fuchow ethnic" cannot be changed. The characteristic of arranged marriages, traditionally by the parents and go-between, is a social norm that the respondent should not be required to change it. *See Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) (stating that Iranian women who refuse to conform to the Iranian Government's gender specific laws and social norms may well satisfy the Acosta definition). The characteristic that the government does not interfere with these kind of traditional arrangement, cannot and shall not required to be changed by the Respondent. She feared that she would either be forced to comply with such norms – entering arranged marriage – or would suffer the consequences. The harm which the Respondent will be forced to undergo, is clearly and unequivocally persecution. Forcing someone to engage in conduct which is "physically painful or harmful" is persecution. *See Fatin* Supra. The

Respondent will be forced to enter the marriage with a person that she was slapped, beaten and knew would not be able to live with for rest of her life. As a result, she will suffer persecution from entering the arranged marriage. Hence, the respondent has met the characteristic in Acosta and guidance in Fatin. Thus, the Immigration Judge erred in finding that the Respondent failed to establish that there is some immutable characteristic that she is unable or unwilling to change.

Furthermore, the social group category within the refugee definition incorporated into the Act has been recognized as having deliberately been included as a "catch all" for individuals not falling into the first four specifically enumerated categories of political opinion, race, religion, or ethnicity. See Krisin E Kandt, *United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison,* 9 Geo. Immigr. LJ. 137, 145 (1995) (Citing T. Alexander Aleinikoff, *The Meaning of "persecution" on United States Aasylum Law,* 3 Int'l J. Feguhee L. 5, 11 (1991); see also Pamela Goldberg, *Any Place But Home: Asylum in the United States for Women Fleeing Intimate Violence,* 26 Cornell Int'l. L.J. 565, 591-592 (1993) (cited International scholar Atle Grahl-Madsen considers it to be broader than the other categories and to have been added to the Convention precisely to protect against persecution that would arise from unforeseeable circumstances.) This case fails within such category.

As to the second issue, the Immigration Judge erred in finding that the respondent has failed to establish that she is a refugee and that the government would not protect her. To qualify for asylum, an applicant must demonstrate that he or she is a "refugee" within the

meaning of § 1101(a)(42)(A) of 8 U.S.C. §1158(a). Section 1101(a)(42)(A) defines "refugee" as:

Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Here, the Respondent qualities as a refugee because she is outside of her country and is unwilling to return or to avail herself of the protection of her country because i) she has suffered past persecution and ii) has a well-founded fear that if she returns to China, she will be persecuted on account of political opinion and her membership in a particular social group.

While the INA does not provide a precise definition of persecution, the term has been construed as requiring a showing by the alien that harm or suffering will be inflicted upon him/her in order to punish him/her for possessing a belief or characteristic a persecutor sought to overcome. *See Faddoul v. INS*, 37 F.3d 185, 188 (5th Cir. 1994) (quoting *Guevara Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986); *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), "The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life." *Mikhael v. INS*, 115 F.3d 299, 303 (5th Cir. 1997). Persecution may also be established by "cumulative, specific instances of violence and harassment toward an individual and his/her family members not only by the government,

but also by a group the government declines to control." *Singh v. INS,* 94 F.3d 1353,1358 (9th Cir. 1996). The Respondent testified that she and her family had been harassed by Mr. Chen Zhi, the future husband by the arrangement. The Respondent was even beaten up and slapped. It has been the Chinese government's policy not to interfere with such marriage arrangement inherited from feudal system. The Respondent also testified that Mr. Chen Zhi's paternal uncle was a prominent figure in the village. He had connection and power to make government arrest people. Mr. Chen Zhi threatened her family to have his uncle sue the Respondent's family. The circumstances that cumulative, specific instances of violence and harassment toward the respondent and her family members by a group the government declines to control, clearly fall within the decision in *Singh v. INS*. Accordingly, the Immigration Judge erred finding that the Respondent failed to establish that she is a refugee and that the government would not protect her.

The Respondent has a well-founded fear of future persecution if she returns to her country because Chen Zhi will continue to his pursuit, will ask his paternal uncle to exercise his influence and will continue to harass the Respondent until she agrees to the marriage. The government will not change its policy of not to interfere with traditional marriage arrangement. Thus, the Respondent has established that she falls within the definition of refugee.

WHEREFORE, Respondent respectfully requests that the appeal in this matter be granted and the Judge's decision not to grant asylum be reversed.

/s/ Morry Cheng

Morry Cheng, Esq., Of Counsel
Fengling Liu, Esq.
Law Office of Fengling Liu
Attorney for Respondent
401 Broadway, Suite 1402
New York, NY 10013; (212) 226-3969

CERTIFICATE OF SERVICE

RE: File No. A77-994-017
in the Matter of: Gao, Hong Ying

I HEREBY CERTIFY that on this 2nd day of July 2003, a true and correct copy of the attached Brief for Appeal was served by first class mail, postage prepaid in a properly wrapped envelop deposited in a depository under the exclusive custody of the US Postal Service in City of New York to:

INS
Litigation, Room 11th Fl
26 Federal Plaza
New York, NY 10278

/s/ Morry Cheng

Morry Cheng, Esq., Of Counsel
Fengling Liu, Esq.
Attorney for Respondent
401 Broadway, Suite 1402
New York NY 10013
(212) 226-3960

APPENDIX C

(Translation)

Respectable Honorable Judge,

How are you? My name is Ai Xian Gao. I am mother of Hong Ying Gao. I swear that the following I am going to say is true and correct.

In July 2000, a matchmaker introduced a person to my daughter, Hong Ying Gao. At first, we felt he was a good young man when that matchmaker introduced him. Later on, we gradually found out that he was a gambler who was lazy, obsessed with eating and had a bad temper. He owed other people a lot of money in his gambling. He quarreled with my daughter time and again. Each time, my daughter told me full of tears. At this time, I felt regret. I felt sorry that I did not find a good young man for her. Later, my daughter proposed to cancel the engagement. He refused. He threatened that he would marry my daughter when she was 21 years old. Otherwise, he would find connections and ask his powerful and rich uncle who was an official in the country government to arrest my daughter. He would charge us for cheating other people's money by canceling engagement. We really did not have other choice. For my daughter's happiness, we let her be smuggled into the United States. Since my daughter left, that scoundrel came to my home for trouble making several times. He asked me to turn my daughter in. He did not believe that my daughter went to the United States. At first, he led a group of people to smash some articles in my home. Thanks to the help of neighbors, they left. We promised him we would return the engagement money to him in a short time. Then, we would give some money as compensation. What could we do? We had no way out. We

had to endure the harassment. We are now trying to hide and borrow around. We hope that we can stop these scoundrels. Therefore, I implore that Honorable Judge of American government gives my daughter a change to let her live and work in the United States. Right now, Chinese government is not good. If my daughter returned to China, she will be sentenced and put into prison. Furthermore, if that scoundrel knows that my daughter comes back, he will surely come again to look for trouble. I implore that you accept my daughter. Here, I show my regards to Honorable Judge and everybody.

Verbal statement (mother): Gao, Ai Xian (signature)

Writer: Gao, Qiao (signature)

I, Gang Wang, hereby certify that I am competent to translate from the Chinese into English, and that the translation is true and accurate to the best of my abilities.

/s/ Gang Wang
Gang Wang

FILED
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SUPREME COURT, U.S.

3

No. 06-1264

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

HONG YIN GAO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In the Supreme Court of the United States

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ALBERTO R. GONZALES, ATTORNEY GENERAL,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The *majority*—approximately 60%—of all marriages worldwide are arranged, and in a number of countries almost all marriages are arranged. See Pet. 12, 19; see also *Elias* v. *Gonzales*, No. 06-3366, 2007 WL 1713323, at *5 (6th Cir. June 15, 2007). Accordingly, the court of appeals' holding that respondent, who faced the prospect of an arranged marriage, could qualify as a refugee, because she was a member of a "particular social group" and because the marriage itself would be a form of persecution on account of her membership in that group, has profound implications for immigration law and the sensitive foreign policy and foreign cultural judgments such a decision embodies.

The court of appeals adopted its broad ruling, moreover, without any express consideration of the "particu-

lar social group" question by the expert agency, and its decision, in fact, conflicts with the Board of Immigration Appeals' and the Third Circuit's definition of particular social group. The decision also defies established principles of judicial review of agency action and ignores this Court's precedents, which have repeatedly reversed or vacated similarly overreaching judicial judgments. See, *e.g.*, *Gonzales* v. *Tchoukhrova*, 127 S. Ct. 57 (2006); *Gonzales* v. *Thomas*, 126 S. Ct. 1613, 1615 (2006) (per curiam); *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam). Indeed, *Thomas* and *Ventura* make clear that the "basic asylum eligibility decision" must be made by the agency in the first instance. *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16). When, as here, a court "independently create[s] potentially far-reaching legal precedent," it "seriously disregard[s] the agency's legally mandated role," *Ventura*, 537 U.S. at 17, and its judgment should be vacated.

1. Respondent does not dispute the court of appeals' obligation to remand legal questions to the agency for resolution in the first instance. Instead, respondent denies (Br. in Opp. 11) that there was any such error here, contending that the agency had addressed the same social group claim adopted by the court of appeals. But that argument is refuted by the very opinion it attempts to defend. The Board did not address the particular social group question at all. It simply affirmed, "without opinion, the *results* of the decision" of the immigration judge. Pet. App. 19a (emphasis added).

With respect to the decision of the immigration judge (IJ), the court of appeals itself stressed the agency's *lack* of consideration of the particular social group claim. The court described the IJ's "analysis of the 'particular social group' issue [a]s (to say the least) *sparse*," Pet.

App. 15a (emphasis added), and stressed that the IJ "*failed to apply* the correct definition of the 'particular social group' ground," *id.* at 2a (emphasis added), "*failed to analyze*" whether respondent had established that she faced persecution on account of an immutable characteristic, *id.* at 15a (emphasis added), and had *not "explained"* why this dispute between the families over the marriage arrangement did not establish that respondent was a refugee, *ibid.* (emphasis added).

Contrary to respondent's argument (Br. in Opp. 11), the identification of such errors did not license the court of appeals to formulate important new principles of immigration law de novo. Rather, "the function of the reviewing court end[ed] when an error of law"—here, the IJ's asserted failure to "analyze" certain issues, "apply" governing principles, or "explain[]" her conclusion —"[was] laid bare." *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). At that juncture, "the proper course" for the Second Circuit was "to remand to the agency for additional investigation or explanation" of the particular social group claim. *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16). The court's "judicial judgment cannot be made to do service for an administrative judgment." *Ibid.* (quoting *Ventura*, 537 U.S. at 16).

Moreover, the IJ's opportunity to consider respondent's particular social group claim was frustrated by the court of appeals' independent reformulation of that claim. The social group identified by the court of appeals—"women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable," Pet. App. 14a—was never advanced by respondent before the IJ. Instead,

before the IJ, respondent proposed a particular social group composed of "females who are in arranged marriages." *Id.* at 25a; see A.R. 78 (Br. in Opp. App. 32a) ("And also we claim under the social group that in, in her, in her area that the females marriage being arranged.").

Respondent attempts to avoid the application of *Thomas* and *Ventura* by arguing (Br. in Opp. 11) that the difference between arranged marriages and being sold into a forced marriage was "purely semantic" in this case. But respondent disproves her own point by identifying the various factual findings necessary to establish a forced marriage, including a showing of duress. *Id.* at 12. If, as respondent argues, factual findings were critical to her claim, then the Second Circuit had an obligation to remand to permit the record to be reopened for evidence and to allow the IJ to make the requisite factual findings. See *Thomas*, 126 S. Ct. at 1615 (remand required where consideration of particular social group claim "requires determining the facts and deciding whether the facts as found fall within a statutory term"); *Ventura*, 537 U.S. at 18.

2. The court of appeals' violation of the *Ventura* and *Thomas* remand rule did not stop with its holding that respondent was a member of a particular social group. The court also held both that respondent had established that she might be "persecuted" in China—an element of an asylum claim the court found to be satisfied "in the form of lifelong, involuntary marriage," Pet. App. 14a—and that the persecution was "on account of" her membership in the particular social group of women "sold into * * * forced marriages," *ibid.*; see *id.* at 15a-16a.

Respondent makes no effort to defend the court of appeals' independent consideration and resolution of those additional questions, rather than remanding them to the agency. Respondent does not dispute that neither issue was addressed by the IJ or the Board. Nor does respondent contend that the court of appeals had any legal basis for preempting the agency's consideration of those issues in the first instance.

Vacatur and remand is independently warranted for those violations of the *Ventura* and *Thomas* remand rule. As the petition for a writ of certiorari explains (Pet. 15-16), the court of appeals' sweeping holding that an arranged marriage constitutes "persecution" has significant implications for immigration policy, given the prevalence of that practice around the world. In addition, the court's conclusion that persecution had been established notwithstanding that any pressure to marry would exist only if respondent and her parents "continue to be unable to repay [Zhi's] money," Pet. App. 15a, adopts a novel view of persecution.[1] Whether and when a "possibility" of persecution, Pet. App. 15a, that is itself contingent upon a separate event—an event that both is within the control of the alien and her family and does not implicate any distinctly protected rights—can constitute "persecution" "on account of" a protected status is a novel and important question of immigration law that should be decided in the first instance by the Executive Branch, which both Congress and the Constitution

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[1] See A.R. 64 (Br. in Opp. App. 17a) ("And later [Zhi] asked my family members again that if they failed to present me he would summon his paternal uncle to sue my family. Because my family took his money at the time of the engagement and he could sue my family as cheating him for the money.").

have vested with responsibility for making such sensitive foreign policy decisions.[2]

3. Lastly, respondent contends (Br. in Opp. 13-17) that the court of appeals' violation of the ordinary remand rule and adoption of a new and potentially sweeping "particular social group," as well as a unique conception of "persecution," are not sufficiently important as to warrant this Court's intervention. That argument is without merit for three reasons.

First, this Court's summary reversals of decisions of the Ninth Circuit for commission of the identical error in construing "particular social group" in *Thomas*, see 126 S. Ct. at 1613-1615, and failing to remand aspects of the "persecution" question in *Ventura*, 537 U.S. at 14-18, confirm the significance of the court of appeals' error and the critical importance of leaving construction of those key terms in the "basic asylum eligibility decision" to the agency in the first instance, *id.* at 16.

Second, as the petition explains (Pet. 18-19), the court of appeals has adopted a definition of "particular

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[2] The court of appeals' conclusion that a well-founded fear of persecution had been demonstrated is without basis. Certainly Zhi's threat to sue for breach of contract and isolated disruptive efforts to get his money back fall far short of persecution. Similarly, the fact that he learned that respondent lived somewhere in the city of Mawei (see Pet. App. 17a; A.R. 73 (Br. in Opp. App. 26a))—a city with a population of more than 200,000—provides no basis for the court's rejection of the IJ's determination (Pet. App. 17a) that respondent could avoid Zhi's efforts by relocating within China. See also A.R. 66 (Br. in Opp. App. 20a) (When asked "[w]hy didn't you just relocate to somewhere else in China?," respondent replied: "Because at that time, many people came to the United States. I thought about going to some other places. But what I heard and saw people coming to the United States and eventually I wanted to come to the United States. And I heard the other people say you could apply for political asylum here.").

social group" that is at odds with the construction of that term adopted by the Board. About the same time the court of appeals adopted its novel and sweeping definition of "particular social group" in this case, the Board was itself considering the proper construction of that important term. See *In re C-A-*, 23 I. & N. Dec. 951 (BIA 2006). The Board held in *C-A-* that an "important element in identifying the existence of a particular social group" is the "recognizability" and "social visibility[] of the group in question." *Id.* at 959-960. In other words, a particular social group should have a distinct and visible social identity within the country "recognizable by others in the community," and that identity "cannot be defined exclusively by the fact that its members have been subjected to harm." *In re A-M-E-*, 24 I. & N. Dec. 69, 74 (BIA 2007); see *In re C-A-*, 23 I. & N. Dec. at 960. The Board thus made clear that "particular social group" does not mean a persecuted group. The group identity must exist and be socially visible separate and apart from the persecution.

The "particular social group" adopted by the court of appeals here is irreconcilable with the Board's expert construction of that term. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Unlike the Board, the court of appeals defined its social group in terms of the alleged persecution—"women who have been sold into marriage," Pet. App. 14a—and then held that the marriage into which the women have been "sold" is "persecut[ion]," *ibid.*, and (to complete its circular reasoning) that the marriage is persecution "on account of" membership in that group, *ibid.* Indeed, the Board has noted the conflict between its test for identifying a "particular social group" and the Second Circuit's decision in this case. See *In re A-M-E-*, 24 I. & N. Dec. at 75 n.7.

The Second Circuit's decision also conflicts with a decision of the Third Circuit, which held that a "particular social group" cannot be defined by the persecution and must exist independently of it. See *Lukwago* v. *Ashcroft*, 329 F.3d 157, 171-172 (3d Cir. 2003) (rejecting social group composed of children who were abducted and enslaved because "under the statute a 'particular social group' must exist independently of the persecution suffered by the applicant for asylum"). Because the Second Circuit denied the government's petition for rehearing en banc in this case, Pet. App. 27a-28a, only this Court's intervention can repair that division in the law and permit the Board to adopt and implement a uniform federal definition of "particular social group."

Third, more than 5000 asylum cases arise annually within the Second Circuit, a significant percentage of which implicate the definition of "particular social group" or "persecution." As in *Thomas* and *Ventura*, the questions thus arise with sufficient frequency and are of sufficient importance as to merit this Court's review. Furthermore, as the petition explains (Pet. 21), the Second Circuit's sweeping definition logically would extend to *prohibit* any person who "assisted, or otherwise participated in the persecution" from obtaining asylum, thereby potentially barring thousands of persons—parents, relatives, and matchmakers—around the world, where arranged marriages predominate, from obtaining asylum, regardless of the severity of persecution they might face.

Respondent argues (Br. in Opp. 14) that the court of appeals' violation of the long-settled remand rule is not harmful because demonstrating membership in a particular social group is only the first step in establishing eligibility for asylum. As respondent notes (*ibid.*), the